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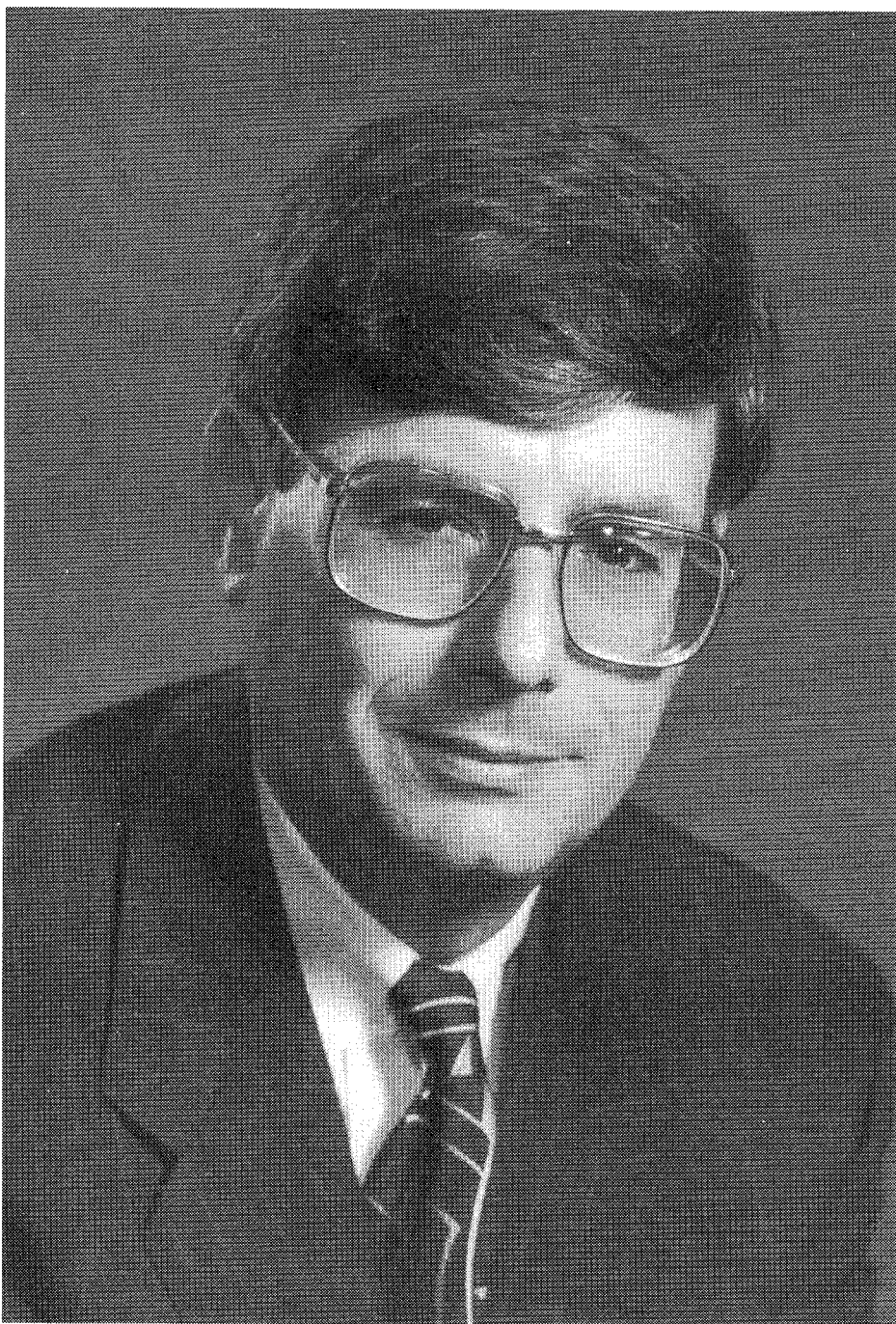


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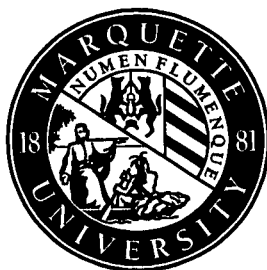


HOWARD B. EISENBERG

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IN MEMORIAM HOWARD B. EISENBERG

FOREWORD

JOSEPH D. KEARNEY*

Howard B. Eisenberg, Dean and Professor of Law at the Marquette University Law School, died unexpectedly at the age of fifty-five on June 4, 2002. There followed an unusual public outpouring of grief and memorials as people with whom Howard had come into contact during his extraordinary career grappled with the fact of Howard's death.¹ To this we now add this special issue of the *Marquette Law Review*.

The important role of law reviews in the legal profession makes this an especially appropriate memorial to Howard's life and work. It caused me no surprise when, only minutes after our learning of Howard's death, my Northwestern University friend and co-author who was with me at the time, Professor Thomas W. Merrill, told me as I departed, "Be sure to do a memorial issue of the law review." The Editor-in-Chief and Managing Editor of this volume, who had been in those positions for only a short period and had not yet had occasion to produce a single issue, had the same thought when they contacted me

* Associate Professor of Law, Marquette University Law School. B.A., Yale University, 1986; J.D., Harvard University, 1989.

1. See, e.g., Amy Rabideau Silvers, *Howard Eisenberg 1946-2002; Helping Others Was a Lifelong Goal for MU Law Dean; Colleagues Remember Caring Attorney*, MILWAUKEE JOURNAL SENTINEL, June 5, 2002, at 1A; Todd Richmond, *Marquette Law Dean Dies*, CAPITAL TIMES, June 5, 2002, at 3A; James Janega & Monica Davey, *Howard B. Eisenberg, 55; Lawyer Led Priest Sex-Abuse Panel*, CHICAGO TRIBUNE, June 6, 2002, at 9; Editorial, *Milwaukee Suffers a Big Loss*, MILWAUKEE JOURNAL SENTINEL, June 6, 2002, at 18A; Joseph D. Kearney, *Eisenberg: A Hero Devoted to Justice*, MILWAUKEE JOURNAL SENTINEL, June 6, 2002, at 19A; Editorial, *Eisenberg Was Model Wisconsin Citizen*, WISCONSIN STATE JOURNAL, June 7, 2002, at A14; Leslie Schmerin, Letter to the Editor, *Howard Eisenberg: Law School Dean Had Open-Door Policy*, MILWAUKEE JOURNAL SENTINEL, June 7, 2002, at 18A; Ed Garvey, *Two Men Who Fought for What's Right Inspire Us*, CAPITAL TIMES, June 11, 2002, at 9A; Jim Stingl, *Letters to Inmates Show Dean's Devotion*, MILWAUKEE JOURNAL SENTINEL, June 16, 2002, at 1B; George C. Brown, *Raising the Bar*, WISCONSIN LAWYER, July 2002, at 3; Colleen D. Ball, *Of Habeas Law and Pink Ballerinas*, WISCONSIN LAWYER, July 2002, at 4.

the next day. Since then it has been my privilege to work with the editors of the Law Review to secure the contributions that comprise this special issue and to prepare it for publication.

It is appropriate that there be a memorial issue of the *Marquette Law Review* to honor Howard B. Eisenberg, almost apart from the fact that he was the Dean of the Law School at the time of his death. This Law Review was especially important to Howard. It is the journal that published his first piece of legal scholarship in 1972,² his last piece of legal scholarship earlier this year (some thirty years later),³ and pieces in between these bookends.⁴

Beyond all this, however, Howard Eisenberg had an appreciation of the role of a law review in the intellectual life of a law school. Thus, he supported this Law Review in its undertakings, taking care in the appointment of its faculty advisors, raising funds to move and expand its office, and supporting essentially any request for improvement that the editors of the journal made. Less tangibly, he conveyed the sense that the Law Review has a unique role to play within the institution and the legal profession.⁵

It is thus with great pride and simultaneous sadness that the editors of the *Marquette Law Review* present this special issue. A word or two of further explanation may be appropriate, as this issue deviates from some conventions. In particular, the editors determined that the

2. Howard B. Eisenberg, *Post-Conviction Remedies in the 1970's*, 56 MARQ. L. REV. 69 (1972).

3. Joseph D. Kearney & Howard B. Eisenberg, *The Print Media and Judicial Elections: Some Case Studies from Wisconsin*, 85 MARQ. L. REV. 593 (2002).

4. Howard B. Eisenberg & Bruce G. Fuestal, *Pre-Trial Identification: An Attempt to Articulate Constitutional Criteria*, 58 MARQ. L. REV. 659 (1975); Howard B. Eisenberg, *The Importance and Place of the Wisconsin Reports on the Delivery of Legal Services and Legal Education*, 80 MARQ. L. REV. 705 (1997).

5. I recall several years ago when the then editor-in-chief of the Law Review made the mistake of setting the date of the annual law review dinner without checking the Dean's calendar and thereby scheduled it on a date that Howard was to be out of town, visiting alumni. Although there may have been some events at the school that Howard would not have regretted missing, this mix-up did not play well. Suffice it to say that, as I understand it, one of the few instructions given by the outgoing editor-in-chief over the past several years to his or her successor has been to check the Dean's calendar in advance of scheduling the law review dinner. Indeed, one of my regrets is that this year's new members will not be able to hear Howard speak at the dinner in the spring, where he invariably allowed that the members of the law review were "our best and our brightest." Ever sensitive to his broad role, Howard would also quickly explain that various other students were "our best and our brightest, too," but he somehow was able to do so in a way that did not retract (or even detract from) the first statement. If those statements seem incompatible, it is only because perhaps I lack Howard's ability to articulate the fine Jesuitical reasoning necessary to reconcile them.

approach, sometimes seen, of a few commemorative essays at the beginning of an ordinary issue of the journal would be insufficient here. This decision derives from Howard's extraordinary legal career.

The organization of these essays is, in its essence, chronological and relates to Howard's career. Thus, the essays start with some reflections about Howard even before he went into law (pp. 223-29), continue with observations about his time as a law student at the University of Wisconsin (pp. 230-38), and then proceed according to the series of positions that Howard held over his thirty-year career: as a law clerk to Justice Horace Wilkie at the Wisconsin Supreme Court from 1971 to 1972 (pp. 238-42), as the State Public Defender of Wisconsin from 1972 to 1978 (pp. 243-53), as Defender Director and then Executive Director of the National Legal Aid and Defender Association from 1978 to 1983 (pp. 254-64), as a faculty member and clinical director at the Southern Illinois University School of Law from 1983 to 1991 (pp. 264-91), as Dean and Professor of Law at the University of Arkansas Little Rock School of Law from 1991 to 1995 (pp. 291-302), and then again as a citizen of Wisconsin and as Dean and Professor of Law at Marquette University Law School from 1995 until his death earlier this year (pp. 302-400).

Yet we recognize that there are difficulties with this arrangement. First, although most of us at Marquette knew him only as the dean of our school for the past seven years, Howard made a lasting mark on the legal profession, in Wisconsin and elsewhere, long before assuming the deanship. Thus, there are contributors to this issue who could write with almost equal facility about multiple aspects of his career, and even a few who could write about all aspects. Where there is an essay by such an individual, we have made some sort of determination as to the "core" of the piece and placed it accordingly.

Second, Howard did extraordinary and important work quite apart from any of his official roles. To take only the most obvious example, he maintained an active pro bono law practice while dean at Little Rock and here at Marquette. He underwrote the expenses of his pro bono cases with his personal funds and even used a post office box for "Howard B. Eisenberg, Attorney at Law," to avoid any ambiguity as to whether the litigation positions that he took were positions of the university or the law school where he taught. Indeed, his pro bono practice was so active that Judge Morris Arnold of the Eighth Circuit can write here that Howard B. Eisenberg was "the most successful habeas lawyer ever in the history of our circuit" (p. 292), Judge Terence Evans of the Seventh Circuit can testify that the number of

appointments Howard B. Eisenberg accepted from his court "dwarfs the number of appointments accepted by any other lawyer in our circuit" (p. 242), and we who knew Howard can read these and similar statements without any sense of wonder—until, perhaps, we pause to consider the matter. In all events, this work, too, is memorialized here, even in the midst of tributes to Howard's accomplishments in his day jobs.

Two further observations about the contents should be made. We include at appropriate places in the issue some of Howard's past speeches (and in one instance an essay) which seemed to have particular lasting value. In addition, as an Appendix to this Foreword, we reproduce Howard's curriculum vitae. He prepared it for a case that he was handling in May 2002; it thus includes a list of published decisions in appellate cases that he had argued, although it does not include any of the numerous cases that Howard argued but in which the courts did not formally publish their decisions.

Finally, it is appropriate to add a word concerning the contributors to the issue. We solicited contributions from various individuals for a wide variety of reasons—because we perceived them as being close to Howard or to his family, because they had worked with Howard in the past and had a particular appreciation for some aspect of his career, because they were his admirers, etc. We have no doubt that readers will agree that each of the essays says something both true and important about Howard. It is regrettable but inevitable that in the case of a public man such as Howard Eisenberg we will have failed inadvertently to invite contributions from other individuals who would have been equally or in some instances more appropriate. We hope that any who are omitted and might think themselves to have been properly invited will recall instead the purpose of the issue—honoring a departed leader and friend—and pardon us any oversight.

I wish to return once more to the question of the need for this issue of the *Marquette Law Review*—just what is this special issue? For those of us fortunate enough to have known Dean Eisenberg, it is a reminiscence today and perhaps an aide-mémoire tomorrow. In this context, that is sufficient to justify the publication. The issue is also a sort of legal history: to take just one example, the set of essays on Howard's work as State Public Defender of Wisconsin from 1972 to 1978 (pp. 243–53) captures an era in the legal history of this State that merits memorialization. Although this was Howard's first position after clerking at the Wisconsin Supreme Court, it may have been his most important work, as the essays reveal.

But, most broadly, the issue is what in an earlier age might have been called "a life." This is appropriate because law reviews have a capacity to speak across the generations—to all those lawyers, academics, and students, for example, who share the venerable tradition of simply paging through old issues of law reviews and looking for familiar names in past mastheads. Articles and essays, of course, have even greater communicative power. Indeed, the first page of the first issue of the *Marquette Law Review* speaks with clarity on this:

In giving the "Marquette Law Review" to the bench and bar of Wisconsin, the students of the College of Law of Marquette University have undertaken a most commendable work. The institution, like the individual, grows through its ideals and lives by its spirit. There can be no progress but through striving to reach the ideal. There can be no life, except the life of the spirit. But the institution which would expand and fulfill its mission must make known its ideals and communicate its spirit. The most effective way of doing both is by means of a suitable magazine. The "Marquette Law Review," of which this is the first number, is such.⁶

Some years ago there was in this school a short-lived course in the first semester of the first-year curriculum, "Lawyer in American Society." The course was eventually decommissioned, not least because the faculty could find no agreement as to what the content of the course should be or how it might be taught. It seems to me that entering students at the Marquette University Law School—or the University of Wisconsin Law School for that matter or, indeed, any law school—could do much worse in terms of an introduction to the possibilities for a lawyer in American society than to read the essays in this special issue and thereby to learn something about the career of Howard B. Eisenberg, attorney.

We at the Marquette University Law School cannot claim as our own the accomplishments recounted here, as they belonged primarily to Dean Eisenberg and his family. What nonetheless we can do, through this issue and otherwise, is seek to "make known our ideals and communicate our spirit."

6. W.A. Hayes, *Foreword*, 1 MARQ. L. REV. 5 (1916).

HOWARD B. EISENBERG

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FAX (414) 288-6403
e-mail: howard.eisenberg@marquette.edu

PRESENT POSITION

Dean and Professor of Law
Marquette University Law School
Milwaukee, Wisconsin
July 1995–

Areas of teaching: Criminal Law and Procedure; Professional Responsibility; Appellate Advocacy; Civil Procedure.

Professional Responsibilities: Chairman, Archbishop's Special Commission to Study Sexual Abuse Among Priests in the Archdiocese of Milwaukee (2002); Wisconsin Board of Bar Examiners (1996–2001; Chairman, 2001; Vice Chairman, 2000); Member (1996–), Circuit Rules Advisory Committee, United States Court of Appeals for the Seventh Circuit (Chairman 1999–2003). President, Association of Religiously Affiliated Law Schools (1995–). Member, Section Board, Appellate Litigation Section, State Bar of Wisconsin (Chairman 2001–02; Chairman Elect 2000–01). Board, Milwaukee Bar Association Foundation (1996–present); Board, Milwaukee Legal Aid Society (1996–present).

Recipient, June 2001, Walter J. Cummings Award presented by the Chicago Chapter of the Federal Bar Association: "In recognition of excellence in advocacy on the part of appointed counsel before the United States Court of Appeals for the Seventh Circuit for the year 2001." (First person to receive the award twice.)

Recipient, January 2000, State Bar of Wisconsin, Award for Outstanding Pro Bono Service.

Recipient, Spring 1999, Wisconsin Women Lawyers Association, Pro Bono Award.

PREVIOUS POSITIONS

*Dean and Professor of Law, School of Law
University of Arkansas at Little Rock
August 1991–June 1995*

Areas of Teaching: Criminal Procedure; Advanced Appellate Advocacy; Civil Procedure.

Recipient, January 1992, First Walter J. Cummings Award presented by the Chicago Chapter of the Federal Bar Association: "In recognition of excellence in advocacy on the part of appointed counsel before the United States Court of Appeals for the Seventh Circuit for the year 1991."

Recipient, June 1994, President's Award, Arkansas Bar Association, for work on continuing legal education programming.

Recipient, April–May 1995, Award of Merit, Pulaski County Bar Association; awards for outstanding service from the Law Student Division of the American Bar Association, from the Black Law Students Association, and from the Student Bar Association.

Elected outstanding faculty member by second and third year classes for 1992–93 academic year.

Member, Arkansas Education Law Revision Commission (1992); Member, Board of Directors, Arkansas Chapter, National Council of Christians and Jews (1994–95); Member, Board of Directors, Congregation Agudath Achim, Little Rock (1994–95).

*Professor of Law, Director of Clinical Programs,
School of Law, Southern Illinois University,
Carbondale, Illinois. July 1987–August 1991.*

*Associate Professor of Law, Director of Clinical Programs,
School of Law, Southern Illinois University,
Carbondale, Illinois. July 1983–June 1987.*

Director of Law School's in-house clinical program which served two primary client populations: persons over the age of sixty who live in the thirteen southernmost counties of Illinois and prison inmates.

Areas of Teaching: Criminal Law; Criminal Procedure; Appellate Advocacy; Law and Aging; Children and the Law; Professional Responsibility.

Faculty advisor, American Bar Association Appellate Advocacy Team. National Champion 1985 and 1986; Regional Champion 1985, 1987, 1988, and 1989. All-Illinois Moot Court Team, first-place team, 1991, finalist team 1987, 1988, and 1989.

Elected Outstanding Faculty Member by senior class, 1986.

Recipient, May 1989, Governor's Award for Unique Achievement for addressing problems of elder abuse.

Recipient, October 1986, Distinguished Service Award for Providing Legal Services to the Elderly, Egyptian Area Agency on Aging.

*Executive Director, National Legal Aid and Defender Association,
Washington, D.C. November 1979–June 1983.*

Chief executive officer for national non-profit organization which advocates and assures that high-quality legal assistance is provided to poor people in civil and criminal cases. Specific duties included supervision of staff of thirty; management of annual budget of between one and two million dollars; fundraising; obtaining and administering various grants; congressional advocacy; extensive interaction with private bar groups—including the American Bar Association and National Bar Association—media, legal services providers, judiciary, and others interested in legal services for the poor.

Recipient, Boston Bar Association Award for Promoting Pro Bono Activities.

*Director, Defender Division, National Legal Aid and Defender Association,
Washington, D.C. September 1978–November 1979.*

Responsible for managing and implementing substantial federal grants to provide technical assistance to organizations, individuals, and local units of government which provide legal assistance to indigent criminal defendants in criminal trials and on appeal.

Developed major work on appellate representation of indigent criminal defendants.

*State Public Defender, State of Wisconsin,
by appointment of the Wisconsin Supreme Court,
December 1972–September 1978.*

Wrote legislation, advocated passage of legislation, and implemented legislation which created an integrated (trial and appellate) public defender system in the entire State of Wisconsin.

Carried heavy appellate caseload and argued more than 200 criminal appeals before the Wisconsin Supreme Court from 1972 through 1978.

Represented indigent criminal defendants in trial and appellate courts.

Assistant State Public Defender, State of Wisconsin, July 1–October 31, 1972.

*Law Clerk to late Justice Horace W. Wilkie,
Wisconsin Supreme Court, July 1, 1971–June 30, 1972.*

PROFESSIONAL DATA

Bar Admissions

State of Wisconsin (1971)
District of Columbia (1980)
State of Illinois (1983)

United States Supreme Court (1974)
United States Court of Appeals for the Seventh Circuit (1971)
United States Court of Appeals for the Eighth Circuit (1983)
United States Court of Appeals for the District of Columbia Circuit (1980)

United States District Courts for the Western and Eastern Districts of Wisconsin (1971)
United States District Court for the Southern District of Illinois (1983)
United States District Courts for the Eastern and Western Districts of Arkansas (1991)
United States District Court for the Central District of Illinois (1993)

Professional Memberships

American Academy of Appellate Lawyers (elected 1992)
American Bar Association
Arkansas Bar Association
Arkansas Trial Lawyers Association
Illinois State Bar Association
State Bar of Wisconsin
Seventh Circuit Bar Association
Appellate Lawyers Association of Illinois
National Academy of Elder Law Attorneys
National Association of Criminal Defense Lawyers
National Legal Aid & Defender Association
Pulaski County Bar Association
Milwaukee Bar Association

Listed in *Who's Who in American Law*, 2d–7th editions.

Rated b.v. in Martindale-Hubbell in 1979 before leaving Wisconsin.

EDUCATION

Legal Education

University of Wisconsin (Madison) Law School, J.D., June 1971, with honors. Rank not officially computed, but was in top 10%.

Undergraduate Education

Northwestern University, Evanston, Illinois, B.A., June 1968, with highest distinction, Phi Beta Kappa. 3.8 average out of 4.0. Undergraduate major: Russian Area Studies.

BIBLIOGRAPHY

"Confessions" in *Illinois Criminal Procedure* (Butterworth, 1987), includes supplements in 1988, 1989, and 1991.

"The Print Media and Judicial Elections: Some Case Studies from Wisconsin," 85 *Marq. L. Rev.* 593 (2002) (with Joseph D. Kearney).

"Criminal and Habeas Corpus Appeals," Chapter Nineteen in *Eighth Circuit Appellate Practice Manual* (Minn. State Bar Association, Continuing Legal Education, St. Paul, Minn.) (2001).

"Discretionary Appellate Review of Non-Final Orders: It's Time to Change the Rules," 1 *J. App. Prac. & Process* 286 (1999) (with Alan B. Morrison).

"Mission, Marketing, and Academic Freedom in Today's Religiously Affiliated Law Schools: An Essay," 11 *Regent U. L. Rev.* 1 (1999).

"The Importance and Place of the Wisconsin Reports on the Delivery of Legal Services and Legal Education," 80 *Marq. L. Rev.* 705 (1997).

"Elder Law" and "Age Discrimination in Employment Act," Chapters in *Arkansas Elder Law Desk Manual* (Ark. Bar Ass'n) (1994).

"A Modest Proposal: State Licensing of Parents," 26 *Conn. L. Rev.* 1415 (1994).

"Rethinking Prisoner Civil Rights Cases and the Provision of Counsel," 17 *S. Ill. U. L.J.* 417 (1993).

"Durable Power of Attorney v. Living Will: Counseling Older Clients," 79 *Ill. B.J.* 384 (August 1991).

"Combating Elder Abuse Through the Legal Process," 1991 *Journal of Elder Abuse and Neglect*, No. 1, p. 65.

"Appellate Review of Discretionary Judicial Determinations," 2 *App. L. Rev.* 8 (Winter 1990).

Surveys of Illinois Law

"Criminal Law," 11 *S. Ill. U. L.J.* 577 (1987) (with William A. Schroeder).

"Criminal Procedure," 11 *S. Ill. U. L.J.* 631 (1987) (with William A. Schroeder).

"Multiple Punishments for the 'Same Offense' in Illinois," 11 *S. Ill. U. L.J.* 217 (1987).

"The Role of the Private Bar in the Delivery of Legal Services to Indigent Persons Charged with Criminal Offenses," *Clearinghouse Rev.*, Summer, 1983.

"The Private Bar and Indigent Criminal Defense—An Overview," *NLADA Briefcase*, November, 1980.

"Quality Representation v. Cost Effectiveness: Have We Compromised Too Much?," *NLADA Briefcase*, Summer, 1979.

Standards and Evaluation Design for Appellate Public Defenders (NLADA, 1980).

"The Impact of *Holloway v. Arkansas*," *NLADA Briefcase*, August, 1979 (with Jack J. Schmerling).

"Criminal, Juvenile, and Mental Commitment Appeals," Chapter 27, pages 159–192, in Martineau, *Wisconsin Appellate Practice* (1978).

"The Long Arm of the Library: Prison Law Collections," 51 *Wilson Lib. Bull.* 514 (No. 6, February 1977).

"Pre-Trial Identification: An Attempt to Articulate Constitutional Criteria," 58 *Marq. L. Rev.* 659 (1975) (with Bruce G. Fuestal).

"The Duties of Trial Counsel After Conviction," *Wis. B. Bull.* (April 1975).

Contributor and Advisor: Defense of Criminal Cases in Wisconsin, University of Wisconsin Law Extension, Ch. 15 (1974).

"Post-Conviction Remedies in the 1970's," 56 *Marq. L. Rev.* 69 (1972).

"No Merit Briefs in the Wisconsin Supreme Court," 45 *Wis. B. Bull.* 28 (1972).

GRANTS RECEIVED AND ADMINISTERED

S.I.U. Law School

Eight grants from the Egyptian Area Agency on Aging to support legal representation of senior citizens (1983–present) (\$260,000 total).

Six grants from the Legal Services Corporation to support the provision of legal assistance to older people in southern Illinois through the Legal Clinic (1985–present) (\$320,000 total).

Six grants from the Illinois Lawyers Trust Fund to supplement the provision of legal assistance to poor persons (1985–present) (\$100,000 total).

A grant from the Retirement Research Foundation to establish a Volunteer Guardianship Program (1989–90) (\$45,000).

N.L.A.D.A.

Substantial grants from the American Bar Foundation (totaling approximately \$600,000); Legal Services Corporation (\$2,000,000); and United States Department of Justice (\$1,000,000+). In addition, program received a number of smaller general-support grants.

State Public Defender

Substantial grants from the Law Enforcement Assistance Administration to expand the public defender system in Wisconsin. Total grants awarded exceeded \$10 million.

PERSONAL DATA

Born December 9, 1946, Chicago, Illinois. Graduate of Chicago Public Schools (Austin High School). Son of Herman and Margie Eisenberg.

Married to Phyllis Borenstein (8/25/68). Three children, Nathan (7/24/72), Adam (6/9/75), and Leah (1/15/79). Religion: Jewish.

PUBLISHED APPELLATE DECISIONS
CURRENT TO MAY 19, 2002

1. *Duckworth v. Eagan*, 492 U.S. 195 (1989)
2. *Granberry v. Greer*, 481 U.S. 129 (1987)
3. *State v. Hall*, 2002 WI App 108, 648 N.W.2d 41 (Ct. App. 2002)
4. *United States v. Thompson*, 285 F.3d 731 (8th Cir. 2002)
5. *State v. Meeks*, 2002 WI App 65, 643 N.W.2d 526 (Ct. App. 2002)
6. *State ex rel. Treat v. Puckett*, 2002 WI App 58, 643 N.W.2d 515 (Ct. App. 2002)
7. *Jones 'El v. Berge*, 164 F. Supp. 2d 1096 (W.D. Wis. 2001) (trial court decision)
8. *Bryson v. United States*, 268 F.3d 560 (8th Cir. 2001)
9. *Koste v. Dormire*, 260 F.3d 872 (8th Cir. 2001)
10. *Boyko v. Parke*, 259 F.3d 781 (7th Cir. 2001), reversing, 155 F. Supp. 2d 1024 (N.D. Ind. 1999)
11. *Lane v. BFI Waste Sys.*, 257 F.3d 766 (8th Cir. 2001)
12. *State v. Eason*, 2001 WI 98, 245 Wis. 2d 206, 629 N.W.2d 625 (2001) (amicus)
13. *Yates v. McDonnell Douglas*, 255 F.3d 546 (8th Cir. 2001)
14. *State ex rel. Seibert v. Macht*, 2001 WI 67, 244 Wis. 2d 378, 627 N.W.2d 881 (2001) (amicus)
15. *Johnson Bank v. Brandon Apparel Group, Inc.*, 2001 WI App 159, 632 N.W.2d 107 (Ct. App. 2001)
16. *Sampson v. Federal Republic of Germany*, 250 F.3d 1145 (7th Cir. 2001)
17. *United States v. Lamarre*, 248 F.3d 642 (7th Cir. 2001)
18. *Loehr v. Walton*, 242 F.3d 834 (8th Cir. 2001)
19. *Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001)
20. *United States v. Searcy*, 233 F.3d 1096 (8th Cir. 2000)

21. Kitchen v. United States, 227 F.3d 1014 (7th Cir. 2000)
22. Chelette v. Harris, 229 F.3d 684 (8th Cir. 2000)
23. Webb v. Anderson, 224 F.3d 649 (7th Cir. 2000)
24. Walker v. O'Brien, 216 F.3d 626 (7th Cir. 2000)
25. People v. Jones, 191 Ill. 2d 354, 732 N.E.2d 573 (2000)
26. Blacharski v. United States, 215 F.3d 792 (7th Cir. 2000)
27. People v. Jones, 191 Ill. 2d 194, 730 N.E.2d 26 (2000)
28. Miller v. Kemna, 207 F.3d 1096 (8th Cir. 2000)
29. State *ex rel.* Speener v. Gudmanson, 2000 WI App 78, 234 Wis. 2d 461, 610 N.W.2d 136 (Ct. App. 2000)
30. Jolly v. Knudsen, 205 F.3d 1094 (8th Cir. 2000)
31. Kingsberry v. United States, 202 F.3d 1030 (8th Cir. 2000)
32. Thomas v. McCaughtry, 201 F.3d 995 (7th Cir. 2000)
33. State v. Ward, 2000 WI 3, 231 Wis. 2d 723, 604 N.W.2d 517 (2000)
34. Holt v. Bowersox, 191 F.3d 970 (8th Cir. 1999)
35. Boyko v. Anderson, 185 F.3d 672 (7th Cir. 1999)
36. United States v. LeBlanc, 175 F.3d 511 (7th Cir. 1999)
37. United States v. Dexter, 165 F.3d 1120 (7th Cir. 1999)
38. Devoil-El v. Groose, 160 F.3d 1184 (8th Cir. 1998)
39. Blankenship v. United States, 159 F.3d 336 (8th Cir. 1998)
40. Berryhill v. Schriro, 137 F.3d 1073 (8th Cir. 1998)
41. O'Connor v. United States, 133 F.3d 548 (7th Cir. 1998)
42. Oimen v. McCaughtry, 130 F.3d 809 (7th Cir. 1997)
43. Wagner v. Hanks, 128 F.3d 1173 (7th Cir. 1997)
44. United States v. Jones, 121 F.3d 369 (8th Cir. 1997)
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47. Spahn v. Eisenberg, 210 Wis. 2d 557, 563 N.W.2d 485 (1997)
48. Easter v. Norris, 100 F.3d 523 (8th Cir. 1996)
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50. Hamlin v. Vaudenberg, 95 F.3d 580 (7th Cir. 1996)
51. United States v. Dumas, 94 F.3d 286 (7th Cir. 1996)
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56. *Jones v. Pillow*, 47 F.3d 251 (8th Cir. 1995)
57. *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994)
58. *Del Raine v. Williford*, 32 F.3d 1024 (7th Cir. 1994)
59. *Hickey v. Reeder*, 12 F.3d 754 (8th Cir. 1993)
60. *Sullivan v. Flannigan*, 8 F.3d 591 (7th Cir. 1993)
61. *People v. Jones*, 155 Ill. 2d 357, 614 N.E.2d 1219 (1993)
62. *Ervin v. Busby*, 992 F.2d 147 (8th Cir. 1993)
63. *Department of Public Aid ex rel. McNichols v. McNichols*, 243 Ill. App. 3d 119, 611 N.E.2d 593 (5th Dist. 1993)
64. *People v. Odle*, 151 Ill. 2d 168, 601 N.E.2d 732 (1992)
65. *Jamison v. Lockhart*, 975 F.2d 1377 (8th Cir. 1992)
66. *Director, OWCP v. Jourdan*, 975 F.2d 1286 (7th Cir. 1992)
67. *Duane v. Lane*, 959 F.2d 673 (7th Cir. 1992)
68. *Barnhill v. Doiron*, 958 F.2d 200 (7th Cir. 1992)
69. *Campbell v. Purkett*, 957 F.2d 535 (8th Cir. 1992)
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81. *Rumble v. Smith*, 905 F.2d 176 (8th Cir. 1990)
82. *Wagner v. Henman*, 902 F.2d 578 (7th Cir. 1990)
83. *Roderick v. Trickey*, 902 F.2d 9 (8th Cir. 1990)
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85. *Humphrey v. United States*, 896 F.2d 1066 (7th Cir. 1990)

86. Blythe v. Lane, 194 Ill. App. 3d 451, 551 N.E.2d 680 (5th Dist. 1990)
87. Gullett v. Armontrout, 894 F.2d 308 (8th Cir. 1990)
88. Flick v. Blevins, 887 F.2d 778 (7th Cir. 1989)
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99. Haymon v. Higgins, 846 F.2d 1145 (8th Cir. 1988)
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101. Haley v. Dormire, 845 F.2d 1488 (8th Cir. 1988)
102. Turner v. Armontrout, 845 F.2d 165 (8th Cir. 1988)
103. Eagan v. Duckworth, 843 F.2d 1554 (7th Cir. 1988)
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108. Turner v. Henman, 829 F.2d 612 (7th Cir. 1987)
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112. *In re Lewis*, 144 Ill. App. 3d 55, 494 N.E.2d 261 (5th Dist. 1986)
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118. *Sanchez v. Miller*, 792 F.2d 694 (7th Cir. 1986)
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120. *Loggins v. Frey*, 786 F.2d 364 (8th Cir. 1986)
121. *People v. Ellis*, 141 Ill. App. 3d 632, 491 N.E.2d 61 (5th Dist. 1986)
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123. *Mendoza v. Miller*, 779 F.2d 1287 (7th Cir. 1985)
124. *Garza v. Henderson*, 779 F.2d 390 (7th Cir. 1985)
125. *Williams v. Armontrout*, 777 F.2d 422 (8th Cir. 1985)
126. *Anderson v. Miller*, 772 F.2d 375 (7th Cir. 1985)
127. *United States v. Fountain*, 768 F.2d 790 (7th Cir. 1985)
128. *United States v. Griffin*, 765 F.2d 677 (7th Cir. 1985)
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131. *In re M.B.C.*, 125 Ill. App. 3d 512, 466 N.E.2d 273 (5th Dist. 1984)
132. *Harris v. White*, 745 F.2d 523 (8th Cir. 1984)
133. *People v. Mitchell*, 105 Ill. 2d 1, 473 N.E.2d 1270 (1984)
134. *Morris v. Slappy*, 461 U.S. 1 (1983) (wrote amicus brief)
135. *Pinellas County v. Maas*, 400 So. 2d 1028 (Fla. App. 1981) (argued as amicus)
136. *Wakulla County v. Davis*, 395 So. 2d 540 (Fla. 1981) (argued as amicus)
137. *Polk County v. Dodson*, 454 U.S. 312 (1981) (wrote amicus brief)
138. *State v. Albright*, 96 Wis. 2d 122, 291 N.W.2d 487 (1980)
139. *Wentela v. State*, 95 Wis. 2d 283, 290 N.W.2d 312 (1980)
140. *Jessen v. State*, 95 Wis. 2d 207, 290 N.W.2d 685 (1980)
141. *Ferri v. Ackerman*, 444 U.S. 193 (1979) (wrote amicus brief)
142. *Scott v. Illinois*, 440 U.S. 367 (1979) (wrote amicus brief)
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144. *Struzik v. State*, 90 Wis. 2d 357, 279 N.W.2d 922 (1979)
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156. *Austin v. State*, 86 Wis. 2d 213, 271 N.W.2d 668 (1978)
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162. *Schimmel v. State*, 84 Wis. 2d 287, 267 N.W.2d 271 (1978)
163. *Mitchell v. State*, 84 Wis. 2d 325, 267 N.W.2d 349 (1978)
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166. *Murray v. State*, 83 Wis. 2d 621, 266 N.W.2d 288 (1978)
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168. *State ex rel. Gebarski v. Circuit Court for Milwaukee County*, 80 Wis. 2d 489, 259 N.W.2d 531 (1977)
169. *Dobbert v. Florida*, 432 U.S. 282 (1977) (wrote amicus brief)
170. *State ex rel. Sieloff v. Golz*, 80 Wis. 2d 225, 258 N.W.2d 700 (1977)
171. *State ex rel. Porter v. Wolke*, 80 Wis. 2d 197, 257 N.W.2d 881 (1977)
172. *Roehl v. State*, 77 Wis. 2d 398, 253 N.W.2d 210 (1977)
173. *State ex rel. Struzik v. Department of Health & Soc. Servs.*, 77 Wis. 2d 216, 252 N.W.2d 660 (1977)
174. *Day v. State*, 76 Wis. 2d 588, 251 N.W.2d 811 (1977)
175. *Johnson v. State*, 76 Wis. 2d 672, 251 N.W.2d 834 (1977)
176. *Reichhoff v. State*, 76 Wis. 2d 375, 251 N.W.2d 470 (1977)
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178. *State v. Hungerford*, 76 Wis. 2d 171, 251 N.W.2d 9 (1977)
179. *Holmes v. State*, 76 Wis. 2d 259, 251 N.W.2d 56 (1977)
180. *Scarbrough v. State*, 76 Wis. 2d 87, 250 N.W.2d 354 (1977)
181. *Keller v. State*, 75 Wis. 2d 502, 249 N.W.2d 773 (1977)
182. *Harris v. State*, 75 Wis. 2d 513, 250 N.W.2d 7 (1977)

183. *Ferris v. State*, 75 Wis. 2d 542, 249 N.W.2d 789 (1977)
184. *State ex rel. Winnie v. Harris*, 75 Wis. 2d 547, 249 N.W.2d 791 (1977)
185. *Klimas v. State*, 75 Wis. 2d 244, 249 N.W.2d 285 (1977)
186. *State ex rel. Memmel v. Mundy*, 75 Wis. 2d 276, 249 N.W.2d 573 (1977)
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190. *Shillcutt v. State*, 74 Wis. 2d 642, 247 N.W.2d 694 (1976)
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192. *Dudrey v. State*, 74 Wis. 2d 480, 247 N.W.2d 105 (1976)
193. *Loveday v. State*, 74 Wis. 2d 503, 247 N.W.2d 116 (1976)
194. *La Barge v. State*, 74 Wis. 2d 327, 246 N.W.2d 794 (1976)
195. *Jameson v. State*, 74 Wis. 2d 176, 246 N.W.2d 541 (1976)
196. *Penister v. State*, 74 Wis. 2d 94, 246 N.W.2d 115 (1976)
197. *Staples v. State*, 74 Wis. 2d 13, 245 N.W.2d 679 (1976)
198. *Lambert v. State*, 73 Wis. 2d 590, 243 N.W.2d 524 (1976)
199. *State ex rel. Milwaukee County v. Wisconsin Council on Criminal Justice*, 73 Wis. 2d 237, 243 N.W.2d 485 (1976)
200. *Grant v. State*, 73 Wis. 2d 441, 243 N.W.2d 186 (1976)
201. *Walberg v. State*, 73 Wis. 2d 448, 243 N.W.2d 190 (1976)
202. *State v. Gloudemans*, 73 Wis. 2d 514, 243 N.W.2d 220 (1976)
203. *Gossett v. State*, 73 Wis. 2d 135, 242 N.W.2d 899 (1976)
204. *Garcia v. State*, 73 Wis. 2d 174, 242 N.W.2d 919 (1976)
205. *Nichols v. State*, 73 Wis. 2d 90, 241 N.W.2d 877 (1976)
206. *Schleiss v. State*, 71 Wis. 2d 733, 239 N.W.2d 68 (1976)
207. *State ex rel. Tyznik v. Department of Health & Soc. Servs.*, 71 Wis. 2d 169, 238 N.W.2d 66 (1976)
208. *State v. Gibbons*, 71 Wis. 2d 94, 237 N.W.2d 33 (1976)
209. *Putnam v. McCauley*, 70 Wis. 2d 256, 234 N.W.2d 75 (1975)
210. *State ex rel. Harris v. Schmidt*, 69 Wis. 2d 668, 230 N.W.2d 890 (1975)
211. *Smith v. State*, 69 Wis. 2d 297, 230 N.W.2d 858 (1975)
212. *State ex rel. Clayton v. Wolke*, 69 Wis. 2d 363, 230 N.W.2d 869 (1975)
213. *Gilbertson v. State*, 69 Wis. 2d 587, 230 N.W.2d 874 (1975)
214. *Wildman v. State*, 69 Wis. 2d 610, 230 N.W.2d 809 (1975)

215. Caccitolo v. State, 69 Wis. 2d 102, 230 N.W.2d 139 (1975)
216. Klonowski v. State, 68 Wis. 2d 604, 229 N.W.2d 637 (1975)
217. State v. Elam, 68 Wis. 2d 614, 229 N.W.2d 664 (1975)
218. State *ex rel.* Holmes v. Spice, 68 Wis. 2d 263, 229 N.W.2d 97 (1975)
219. Hughes v. State, 68 Wis. 2d 159, 227 N.W.2d 911 (1975)
220. State v. Van Duyse, 66 Wis. 2d 286, 224 N.W.2d 603 (1975)
221. Ziegler v. State, 65 Wis. 2d 703, 223 N.W.2d 442 (1974)
222. Ruff v. State, 65 Wis. 2d 713, 223 N.W.2d 446 (1974)
223. Bailey v. State, 65 Wis. 2d 331, 222 N.W.2d 871 (1974)
224. State *ex rel.* Fitas v. Milwaukee County, 65 Wis. 2d 130, 221 N.W.2d 902 (1974)
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226. State *ex rel.* Kovach v. Schubert, 64 Wis. 2d 612, 219 N.W.2d 341 (1974)
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232. Berg v. State, 63 Wis. 2d 228, 216 N.W.2d 521 (1974)
233. Sass v. State, 63 Wis. 2d 92, 216 N.W.2d 22 (1974)
234. Prue v. State, 63 Wis. 2d 109, 216 N.W.2d 43 (1974)
235. Kasieta v. State, 62 Wis. 2d 564, 215 N.W.2d 412 (1974)
236. State *ex rel.* Hussong v. Froelich, 62 Wis. 2d 577, 215 N.W.2d 390 (1974)
237. Simpson v. State, 62 Wis. 2d 605, 215 N.W.2d 435 (1974)
238. Edelman v. State, 62 Wis. 2d 613, 215 N.W.2d 386 (1974)
239. State *ex rel.* Haskins v. County Courts of Dodge and Milwaukee Counties, 62 Wis. 2d 250, 214 N.W.2d 575 (1974)
240. Clark v. State, 62 Wis. 2d 194, 214 N.W.2d 450 (1974)
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242. Hendrickson v. State, 61 Wis. 2d 275, 212 N.W.2d 481 (1973)
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- 247. Hebel v. State, 60 Wis. 2d 325, 210 N.W.2d 695 (1973)
 - 248. Smith v. State, 60 Wis. 2d 373, 210 N.W.2d 678 (1973)
 - 249. Truesdale v. State, 60 Wis. 2d 481, 210 N.W.2d 726 (1973)
 - 250. Libke v. State, 60 Wis. 2d 121, 208 N.W.2d 331 (1973)
 - 251. Myers v. State, 60 Wis. 2d 248, 208 N.W.2d 311 (1973)
 - 252. Weber v. State, 59 Wis. 2d 371, 208 N.W.2d 396 (1973)
 - 253. State *ex rel.* Garner v. Gray, 59 Wis. 2d 323, 208 N.W.2d 161 (1973)
 - 254. State v. Dudrey, 59 Wis. 2d 175, 207 N.W.2d 822 (1973)
 - 255. Stockwell v. State, 59 Wis. 2d 21, 207 N.W.2d 883 (1973)
 - 256. Jones v. State, 59 Wis. 2d 184, 207 N.W.2d 890 (1973)
 - 257. Ball v. State, 57 Wis. 2d 653, 205 N.W.2d 353 (1973)
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ESSAYS

Address to New Citizens

HOWARD B. EISENBERG*

Judge Roy, Fellow Citizens, Distinguished Guests, May It Please the Court:

Over the past twenty years I have had the honor of making many presentations. I have argued cases before the United States Supreme Court. I have testified before committees of Congress and several state legislatures. I have spoken before a wide variety of groups from Hawaii to Puerto Rico. Never have I been more pleased and honored to address a group than I am this morning. Because, you see, I am a first-generation American.

I see in your eyes the eyes of my father when he came to this country seventy years ago. I sense in your opportunity the opportunity presented to my mother's parents when they came to America a decade earlier. America has many problems: racism, poverty, crime, social injustice. And yet, my friends, in all of recorded history only the United States of America has been able to forge a nation out of such a wide variety of peoples from every corner of the globe, of every color and religion, speaking virtually every known language. Even as we struggle to confront the many problems facing this Nation, America remains the land of opportunity, just as it was in 1922 when my father landed at Ellis Island.

There are many things I could say to you about the United States and the challenges and opportunities you face as new citizens, but let me just emphasize two points.

First, set your priorities now and stick to them. For many of you the goal will be obtaining a good job; for others it will be completing your education. Still others came to our shores to ensure that your children and grandchildren have the unlimited opportunities that exist in this country. Yes, those opportunities still exist, but it isn't easy. As I am sure you have discovered, the streets in America are not paved with gold. There are many formidable obstacles, and you have to work to

* This address was delivered on May 8, 1992 at the Naturalization Ceremony at the United States District Court for the Eastern District of Arkansas.

succeed. You will gain little without hard work. But succeed you will, if you set your goals and work towards them.

In a free society there are many distractions. It is possible to spend your money on an endless variety of goods and services, and there are people who will offer you riches without work, power without responsibility. Drugs and alcohol may seem to make your problems easier to manage. Crime and violence may seem expedient ways of getting what you want. But these are false gods which will deter you from your goals of opportunity, education, prosperity, and a better life for you and your families. The American experience has demonstrated time and again that steadfast pursuit of your goals will ultimately lead to success. So plan now for the future and work hard to attain those goals.

Secondly, don't forget your heritage. You have just taken an oath renouncing your political allegiance to your homeland. I am certain that this is a step none of you have taken lightly or without substantial thought. But Mr. Brents did not tell you to renounce your faith, your heritage, or your culture. America is sometimes called the "Great Melting Pot," but when substances melt down and are blended together, the individual ingredients disappear. The strong black is mixed with bright white to create a dull gray. I don't think we in America strive to create only a dull nation of people who are all the same. In fact, our greatest strength lies in our diversity. Over the course of the decades, we in America have found that by combining the best aspects of the wide variety of people who make up this country, we are a stronger and wiser nation.

I prefer to think of the United States as a beautiful quilt, made up of many patches. Individually, each patch is attractive, but when pieced together the final quilt is truly extraordinary. Some patches represent the native people of America whose concern for nature and love of the earth should have served as an example to those of us who came later. Other patches represent the colonists who fled their homelands to find a place where they could practice their beliefs without harassment. An important part of our quilt represents people of color who came to this country, sometimes involuntarily, to work in the fields, factories, and railroads. Another section of this quilt represents my ancestors who even in this century came to this country to escape religious persecution in eastern Europe.

Today we add more patches to our national quilt—for you, patches representing twenty-six countries. Some of you are from as close as Mexico and Canada, others from half a world away. You have come

from Poland and Peru, Nigeria and Honduras, Iraq and Great Britain, Korea and Spain—all seeking the blessings of this Nation. This Nation is richer today because of you. But do not forget the culture, ethics, and morality of your parents that have brought you to this time and place. Regardless of your race, religious background, geographical origin, or political experience, you have much to teach us.

Don't ever think that because you are Americans by choice, you are second-class citizens. You follow a proud line of immigrants that began five centuries ago. It is true that there are some in this country who, forgetting their own heritage, judge a person by the color of his skin, the church she prays in, or the accent in her voice. But these people are a tiny minority of Americans. They do not represent the America my father and you risked everything to join. The success of the American experience is the result of immigrants, just like you, who have built upon the strength of our native peoples to make this country we call the United States of America the greatest nation on the face of the earth, even today, even in 1992.

I thank you for seeking American citizenship; we are honored to have you. I congratulate you on your efforts and welcome your participation in this democracy. Now I charge you with fulfilling your goals and aspirations while, at the same time, assuming your fair share of the burden of making this noble experiment, we call the United States of America, work.

GERALD M. EISENBERG*

There are many thoughts and emotions running through my head over the last several days that I would like to share with all of you this morning. First, on behalf of all of Howard's family, I would like to thank each one of you for sharing your time with us today. We know that many of you have come from far away. This crowd is a confirmation that Howard touched many people's lives in important ways. When I was a kid, and the Dodgers were still in Brooklyn, Howard took me to Cubs games with crowds smaller than this. I'm glad he did it when I was young. I feel as if it immunized me from the dread disease that afflicted Howard his entire life: "Cubitis."

"Only the good die young." None of us really believes that, but

* The writer is a doctor of medicine. These are remarks delivered at the funeral of Howard B. Eisenberg at Temple Menorah in Milwaukee, Wisconsin on June 6, 2002.

every now and again, someone who is good does die young, and there is the wistful notion of how much more good that individual might have done—in Howard's case, would have done. I had the feeling that Howard was just warming up for some of the most important accomplishments of his very accomplished life. I mean no disrespect to Howard's Marquette colleagues and admirers, but it never occurred to me for a moment that Marquette would be his last stop. Everywhere he has gone, he has changed not only people but also institutions and their cultures.

I remember when I first learned that my brother wasn't ordinary. It was exactly forty years ago, shortly before my Bar Mitzvah. We were still living on the west side of Chicago, and I was walking home from a synagogue function with several friends when one of my friend's parents, Mr. Odesser was his name, stopped us on the street and asked his daughter to introduce her friends. When my friend Judy introduced me, Mr. Odesser got this look in his eye and said, "Oooohhh, you must be Howard's younger brother. He's someone special." My friends and I looked at one another. Here was someone who wasn't Howard's teacher or relative and upon whom Howard had made an impact. I doubt I ever said another word to Mr. Odesser, but I remember his words and that look in his eye because I have heard those words and seen that look many times since.

Howard was, indeed, special—an uncommon blend of purpose, drive, intellectual prowess, and a work habit to match. But lest anyone here this morning think that Howard's work habits were a recent development, I can assure you all that Howard's brilliance was, in part, a function of an incredible amount of study that began in high school. He lived at home while attending college, and I was a firsthand witness, just down the hall, to his focus and drive. I am quite certain that I have not seen anyone before or since study any harder. Add this work ethic to his innate intellect, and Howard's college career was an academic bravura performance, and he had his pick of law schools. Sometime in his senior year (we already knew he and Phyllis were to marry), I was talking with him one day. I should add that neither Howard nor I was ever great at brotherly small talk. I asked him casually why he wasn't going to go to Harvard Law School. He looked at me with that matter-of-fact expression and said, "It makes no difference whatsoever where I go." You could interpret that in a number of ways, but I knew exactly what he meant.

After he graduated and got married in 1968, Howard and I never lived in the same city again. But it was not long thereafter that I began

to learn that Howard was not only special but, in some respects, brilliant. Howard has been described in terms of brilliance so often that, I have to admit, it has become routine. At the University of Wisconsin Law School, his achievements academically mirrored and amplified what he had done as an undergraduate, and it never stopped thereafter. In the meantime, Howard and Phyllis began raising a family, and I got married and did the same. I mentioned before that Howard wasn't much for small talk, and I am thankful that Phyllis, his wife, and Irene, my wife, along with my sister Miriam, did the yeoman's work to make sure that our families got together for vacations, religious holidays, and the like. Because of that effort, our children grew up knowing each other well, despite the fact that they did not grow up nearby.

But wherever he went, the reaction was always the same. Howard was a positive agent of change. He was honest to a fault and would tell you exactly what he thought. His thinking was so clear, and his knowledge was so deep, that it was useless for me, and others, I presume, to argue with him for very long. I might add he was pretty stubborn as well. I have spent my career, to an extent, in an institutional milieu, and I can tell you that many times when a dean or other senior administrator leaves, the reaction from those who are left behind is often the same: "It's about time." But whether it was Madison, Washington, Carbondale, or Little Rock, Howard and Phyllis would leave in their wake this incredible reservoir of goodwill. I would hear over and over again how Howard had improved this or changed someone's life. One of the hardest things in the world to do is to change institutional culture, and Howard viewed that as part of his job.

There should be no misunderstanding, however. Howard was no saint. He had his moments of doubt and pain like everyone else. I was amazed to learn a few years ago that Howard enjoyed the ponies, and we all knew that Howard would occasionally partake of Bombay with a few drops of vermouth. Howard's work habits, while legendary among his colleagues, students, and clients, were sometimes referred to in other terms by family members. In his book, *Murder in Little Egypt*, Darcy O'Brien described my brother as a kamikaze, willing to take on any lost cause. What Mr. O'Brien did not understand, however, is that this was business as usual, the standard, for Howard. You can imagine that this work habit occasionally caused some family tension. But if each and every one of Howard's weaknesses and foibles were to be published on the front page of the *New York Times* or *Milwaukee Journal Sentinel*, it would have not an iota of impact on the reputation of Howard Eisenberg, public citizen. My cousin, Leah Temkin, who flew in from

San Diego to be with us today, remarked to me that Howard walked with very heavy footprints on this earth. A measure of that will be years from now, when I see that look in people's eyes when I tell them that I'm Howard's brother.

SHARI SEIDMAN DIAMOND*

On the surface, the Howard Eisenberg I knew was not the Dean of the Law School at Marquette University. The Howard Eisenberg I knew was a quiet, shy, skinny kid with a quirky sense of humor. We both grew up in Chicago and our parents have been close friends for almost fifty years. Some of my fondest memories of childhood come from shared summer vacations when five to seven families would take our annual trip to Ursula's Wildwood Lodge in northern Wisconsin near Rhinelander. The caravan of cars made its way north from Chicago, the whole group stopping if someone needed to use the bathroom. It was not the most efficient way to travel, but each stop presented an opportunity for all of us to change seats and cars, an opportunity we eagerly seized. All of us but Howard, that is. Always self-contained, Howard was busy reading and stayed put. This was the studious side of Howard Eisenberg. He was saving his mischief for arrival at our destination.

The families rented cabins at Ursula's and the kids spent the days swimming and catching crappies and blue gills in the lake during the day. We had to bait our own hooks with long wiggling earthworms and were allowed to keep only the "big" fish (those that were at least six inches long). At night we chased fireflies and used innertubes to create a temporary home for the frogs we caught—a Norman Rockwell picture of summer activity.

Howard set his own course even at play in this lazy and relaxed setting. The lake at Ursula's had a U-shaped pier that enclosed the area where it was safe for the younger children to swim. Most of us stayed close to the pier. One day Howard and his friend Alan April decided that they would leave the pier behind and swim across the lake. Howard's father, reluctant to tell them that they couldn't do it, came up with a plan. He would accompany them in a rowboat so that they could climb in when they were ready to give up. They never did. Instead, to everyone's surprise (except perhaps Howard's), they conquered the

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lake.

Howard and Alan were the ringleaders of mischief, but there was always a lesson lurking when the pranks got out of hand. I know that Howard, with his passion for truth, wouldn't mind Alan's recollection of one of those lessons. It occurred one night after the mischievous duo had "borrowed" our carefully caught frogs for an unofficial anatomy experiment. Parental intervention led to a late night's work for Howard and Alan. They had to replace all of the frogs before we discovered the loss in the morning. I just learned about the replacement after all these years. Howard and Alan never let on.

If someone had asked me in those days what profession Howard would choose when he grew up, I would have guessed he would be a doctor or perhaps a rabbi, or maybe a professional coin dealer. Howard was passionate about coin collecting. Howard's unswerving devotion to a career in law seems logical only in retrospect. After all, he grew up in a medical family—his father an internist and his mother a nurse. His brother Gerry became a doctor and Howard married Phyllis—a nurse. The medical environment extended beyond family to most of the Eisenbergs' close friends. My doctor father and my mother were part of the small circle of mostly medical families who vacationed together and shared Memorial Days, Labor Days, and Fourth of Julys in what seems in memory to have been one continuous picnic. Not surprisingly in those days, a majority of the sons followed their fathers into medicine. Not Howard.

But as I look at the life Howard chose in law, his family upbringing offered deeper influences that left their mark on his career and the life he chose. Margie Eisenberg, Howard's mother, has always had an open house and a strong and warm extended family network, where cousins and nieces and nephews can count on support. Howard's open-door policy as dean mirrored the welcome at the house in which he was raised. His father, Herman Eisenberg, is a real-life Marcus Welby, a doctor everyone trusts and relies upon. Howard's generous contributions to the well-being of those in his care, whether indigent defendants or law students, reflected the same spirit of responsibility. Howard's strong religious upbringing did not produce a rabbi, but it contributed to his strong sense of right and wrong and to his humanity as a ready advocate for those who needed his help. And in the end, the seeds sowed by his regular trips to see family in Wisconsin brought him back to the University of Wisconsin for law school, and eventually to Marquette and a job he treasured and performed brilliantly, with compassion and grace.

Howard Eisenberg—From Student to Dean

GORDON B. BALDWIN*

Not only Marquette suffered in the death of Howard Eisenberg. His absence injures the Milwaukee community and the legal establishment of Wisconsin as well. His service to all marked him as an innovative, industrious, and influential leader who was beginning to become a notable figure in the national constellation of law deans. He embodied the qualities of a wise teacher, a compassionate scholar, and, above all, a person with an ability to learn and listen. He measured up to the demand that great deans be persuasive, and persuadable. Deans must prove able to discover wisdom beyond themselves, and possess power to discard the fads and foolishness that academia so amply harbors. Howard held these qualities and more. No dean could be as effective as Howard without his charm and good humor. His career reminds me of Mark Antony's observation of his mentor: "Here was a Caesar! When comes such another?"

No lawyer, and certainly no academic, had such varied clients, ranging from the Catholic Archbishop of Milwaukee to southern inmates on death row. He gave unstinting effort to all—at the cost of needed rest and recreation. Such valuable work since his return to Wisconsin in 1995 did not surprise his many friends, colleagues, or former teachers. His labors were consistent with the promise noted by those who knew him, even casually, when he graduated from the University of Wisconsin's law school, *cum laude*, in 1971. Howard's industry and intelligent humor, coupled with his evident legal talent for writing, public service, and oral advocacy, promised the distinction he quickly earned.

Howard applied to enter law school here in Madison in early November 1967 with a record including Phi Beta Kappa honors at Northwestern. Acceptance followed in a letter from Assistant Dean Marc Stickgold (now a law professor at Golden Gate) in early January 1968. Graduation from a good competitive program, with a solid major in Russian area studies, and a nicely above-average LSAT established him as one who had a better than average chance of ranking in the upper half of his class. His academic performance proved better than predicted—he graduated in the upper tenth of a competitive class.

In those days, non-resident applicants such as Howard seldom were

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admitted with less than a fifty percent chance of ranking in the middle of their class. Howard enlisted promptly. In early February he visited Madison, talked with at least one assistant dean at the law school (Bill Mett), and the next day sent the appropriate postcard promising to attend the following fall. We have no evidence that he required deep persuasion to undertake the law school challenge, nor do we know if he applied elsewhere, although our records suggest he did not. Our records reveal, however, that he talked with Dean Mett about the value and possibilities of entering the Army ROTC program (he did not enter it). The scholarship committee declined to supply assistance—primarily because of the limited resources then available to non-residents.

Howard's Northwestern transcript confirms a sterling quality—willingness and ability to achieve without outside incentives. In his last three quarters, holding a coveted law school admission, and preparing for marriage following graduation, he earned a straight "A" average in all six courses—his best three quarters at Northwestern. Similarly, his third-year record as a law student was probably the best in his class. The only "C" marring his undergraduate education was earned in his second year in a basic and large economics course. In Russian language and literature courses, however, Howard excelled and earned deserved departmental honors on graduation. Under a National Defense Education Act grant, he visited the Soviet Union in 1967. He understood far better than most the qualities of Russian culture. The works of Dostoyevski and Gorky were the subjects of two of his literature courses. One can only speculate, but rigorous training in literary analysis strikes me as first-class analytical training valuable in reading legal materials. Furthermore, an appreciation for cultural differences increases a lawyer's ability to serve diverse clients. Howard's background proved its value in the three ensuing law school years.

Law study proved challenging and, in his third semester, rewarding. Along with two classmates, Joe Thrasher (practicing now in Rice Lake, Wisconsin) and Eldon Silverman (practicing in Denver, Colorado), Howard won the regional section of the national moot court competition, and a few weeks later in New York captured the national championship. They received their award from Justice Potter Stewart. It should be recalled that in those days before we became engulfed in a myriad of specialized moot court programs this was the only national program. It enlisted nearly all the leading law schools and many regional schools. Competitors not only argued, but prepared the briefs which were also a graded part of the competition. Judging the oral

advocacy component of a moot court competition involves a measure of subjectivity, but Howard's consistently achieving high marks for his moot court work suggests a very modest amount of such subjectivity. Indeed, I recall two of my senior colleagues, Professors Sam Mermin and Abner Brodie, telling me on separate occasions that Howard ranked as the best oral argument presenter in their memory. Both professors were experienced and successful appellate advocates before taking up teaching.

My own experience in moot court competitions some twenty years before Howard's labors proved, in my present memory, more intense and more valuable than the law review enterprises. Moot court competition required one to collaborate closely with colleagues, focus more finely on finding quick and efficient words to communicate, and crystallize ideas in a form that uninformed judges (and faculty) could understand.

In Howard's time we required completion of either a six-month clerkship or the General Practice course as a requirement for graduation. In the summer of 1969, Howard served for three full months in the office of Wisconsin Judicare. He wrote about the right to counsel in "quasi-criminal" proceedings, the power of prison officials to seize letters sent to inmates, and the right of Native Americans to financial grants. What a varied practice he reported! In the summer of 1970, he worked again for Judicare, with greater responsibilities than the year before. The extraordinary range of problems he addressed included whether a prison library properly declined to shelve an opinion of a federal court because the opinion was "too radical" and what might be done to assist the indigent to pay for the printing of briefs on appeal. The Judicare experience shaped much of Howard's subsequent labors on behalf of the poor and dispossessed.

One cannot identify a less satisfactory time to study law than the turbulent 1967-1970 era. Events and reaction to them trespassed upon academic studies. Furthermore, this law school endured a crisis in leadership. George Young, after eleven years at the post, resigned as dean in the fall of 1967. Spencer Kimball, from the Michigan Law School, took office as dean in the summer of 1968—hence Howard was among the first-year students he greeted. New faculty that year were Warren Lehman, Larry Church, and Stuart Gullickson. Our vibrancy, which we hope infected our students, increased in 1969 with the recruitment of James E. Jones and George Bunn (a subsequent dean).

My memories of Howard focus on the recognition he gained in his second year for his moot court prowess, although I remember him,

somewhat, as intense and sensible in a first-year class (I think it was Legal Process). My duties as associate dean, however, were occupied in dealing more with political demonstrations than with student accomplishments. Twice during those times of turmoil I accepted Fulbright teaching assignments, first in Egypt and then in Iran where academic life was for a time more tranquil. Madison, like other large university towns, suffered turmoil and disruption, and several of us treasured opportunities to leave temporarily. A student "strike" in February 1969 garnered little support among law students, but more from our academic neighbors. In mid-1970, student reactions to military actions in Cambodia, and then nearer at Kent State University, produced picketing and a concerted effort by some to close down our university—the effort failed, but National Guard forces were called, and indeed for a day a platoon made its headquarters in a back-building classroom. Civil discourse about the Vietnam problem became rare. On the Madison campus, only the Sterling Hall bombing of August 1970 inspired a measure of quiet.

Those like Howard with a will to learn flourished, but such students were scarcer then than today, though highly valued. My late colleague G.W. (Bill) Foster wrote in a letter endorsing Howard's qualities that he "emerged as probably the most effective and constructive leader among our law students." This constitutes no small praise—among the few other constructive student leaders (I shall not mention others) ranked Ed Garvey, now a Madison lawyer and former candidate for governor, and Walter Dickey, now a valued faculty colleague.

Bill Foster's appraisal of Howard, contained in a letter to Justice Potter Stewart of the United States Supreme Court, hits the mark:

[Howard Eisenberg] is not a usual man. His special strength is an exceptional capacity for perceiving problems in unorthodox, unexpected and sometimes immensely useful and practical ways. . . . Like many in his generation he sharply questioned the institutions around him. He did not stop like most with merely finding fault but pursued workable ways for bringing about change in tolerable fashion

Howard did not receive a U.S. Supreme Court clerkship, but earned what might have been a more valuable professional experience as law clerk to Justice Horace Wilkie of the Wisconsin Supreme Court. In Wisconsin the supreme court justices could hire only one law clerk—it remains that way—and hence the Wisconsin experience enabled a clerk to encapsulate nearly all the assignments his mentor received. Moreover, the small, technical, and specialized private-law problems

that infest state high court dockets give a better warning of the hazards and work of lawyers than can be gained in a position with the Nation's highest court.

In reviewing Howard's career, in which he compressed in his fifty-five years more accomplishments than any other dean I have known, one has several regrets from which we might draw lessons. Should we not persuade our colleagues and ourselves to exercise more, take vacation time, and shift our work habits? Doubtless most people do not work hard enough. But others such as Howard might be faulted for too-persistent labors. Like some other legal figures I know, Howard worked efficiently, but at the price of foregoing sleep. We are indeed richer for his labors, but I deeply wish they could have been spread over a longer lifetime. His death diminishes us all.

MARYGOLD S. MELLI*

Howard Eisenberg was the kind of student that faculty remember—a very bright and assertive student. If you had Howard in class, he did not go unnoticed. Rather, even at that young age, he gave evidence of the remarkable leader he was to become. His intelligence and passion for the less fortunate and other public causes were coupled with a genuine friendliness and warmth that were to mark his legal career as an extraordinary one.

Sam Mermin recalled him as a bright student in his appellate advocacy class, and both he and Orrin Helstad remembered Howard from his participation on the national championship moot court team. Sam took a three-student team to the moot court tournament sponsored by the Bar Association of the City of New York in 1969 where the team won the national championship. Sam noted that he was pleased later to see that, in spite of his success in several legal fields, Howard continued his conscientious pursuit of public service.

Howard came to the law school with an interest and background in civil rights. That background was remembered by Stuart Gullickson, who tells of his first encounter with him. Howard was a first-year student, and Stuart—a new faculty member—was teaching civil procedure for the first time. But Stuart had come to teaching with a background of seventeen years of practice in which he had done considerable personal injury and products liability trial work. He

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recounts:

About six weeks into the civil procedure course, I reached the subject of discovery. It was my favorite area. In my experience, the value of cases has been determined through discovery, if it has been conducted skillfully. The morning we embarked on the study of discovery, I told the class, "When good lawyers conduct discovery it can become the most important phase of civil litigation, often more so than the trial."

Howard's hand went up. I called on him. He bluntly said something like: "I don't think so. Summary judgment is more important." I was taken aback. I had no ready response on the relative merits of summary judgment versus discovery.

By the next class, however, I had figured it out. We were both right and we were both wrong.

I was right that discovery can be crucial—but only for determining disputed issues of fact, such as liability and damages in a tort case. Howard was correct that summary judgment cuts to the heart of the matter—but only when the issues are contested issues of law, such as the constitutionality of an ordinance in a civil rights case in which there is no dispute that the defendant, a black person, sat in at an all-white lunch counter.

We both had erroneously assumed that the whole of the law was what each of us saw through our respective narrow prisms.

It is not too much to say that I learned from Howard's question to look beyond my personal experience and consider the law more broadly.

Stuart reports that he mentioned the incident to Howard a few years later—who did not even remember it. Stuart says that he has never forgotten it.

I remember my first encounter with Howard as Dean of the Marquette Law School. I was organizing a conference on divorce reform and wanted to contact Marquette faculty who might be interested in participating. Not being familiar with all the members of that faculty, I thought I'd call the dean's office for information. I figured that the secretary would be able to refer me to knowledgeable faculty. So, I called the number of the dean's office. Howard Eisenberg answered. When I recovered from my surprise—I don't know many deans who answer their own phones—we had a wonderfully productive discussion, with the result that I not only reached several faculty I did not know, but also had the possibility of some financial support for

obtaining a transcript of the conference.

These may be small examples, but the central point is large and merits explicit statement: Howard Eisenberg will be greatly missed.

WALTER J. DICKEY*

Over the years, I was fortunate to cross paths with Howard Eisenberg, to observe him, to work with him, and to ask his help. A brief recitation of those interactions is instructive.

Howard and I were classmates in the class of 1971 at the University of Wisconsin Law School. Howard was a very good student. But my most vivid recollection of him is not of a particularly verbal class participant. Rather, the image of Howard as a student which I retain is Howard helping students in need of help to prepare for classes and examinations.

Several years after graduation, Howard asked me if I would come down to the Capitol and support the effort to create a statewide public defender system. I was there when Howard testified, setting forth the facts in compelling detail to a joint committee which ultimately recommended that Wisconsin create the system that has served it so well in the ensuing decades. He was prepared to discuss—and did—why justice and economics required the State to act as he proposed.

My next interaction with Howard was when he called me from Southern Illinois University School of Law. I was the head of the correctional system at the time, and he was trying to assist several Wisconsin inmates whom we had persuaded the Federal Bureau of Prisons to house at the penitentiary at Marion. The prisoners needed access to Wisconsin legal materials in order to pursue post-conviction relief in Wisconsin courts, and Marion, located in southern Illinois, did not have the necessary legal materials. I dutifully wrote down the list of materials that Howard said that the prisoners needed and had them sent.

A few years ago, I helped create a non-profit corporation to provide financial assistance to law students who spent the summer providing legal services to prisoners. Our hope and expectation were that graduates of the Remington Center would want to help current students have the experience the graduates had had so that the students did not have to go into unreasonable debt. Not only did Howard agree to serve

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on the Board of Directors and himself make a generous donation, but he took time out of his busy schedule as dean at Marquette to meet with me on several occasions to provide valuable advice to a novice fundraiser.

Howard was the Chair of the Board of Bar Examiners when a graduate student of mine, who had substance abuse problems when he practiced in another state, sought admission to the Wisconsin bar. The staff recommendation was to deny admission. Upon my advice, the frustrated student applied for a hearing before the full Board. Knowing nothing more about the Board than that Howard was its Chair, I assured the young man that he would get a full and fair hearing on his application. I attended the hearing which Howard chaired. It was full and fair. And, because of that fact, it had a favorable outcome for the young man.

My last contact with Howard was to explore the possible creation of a statewide commission to consider what lessons for the criminal justice system in Wisconsin might lie in the large number of people convicted of serious crimes whose innocence was later vindicated. Howard wholeheartedly supported this idea, but he died before we could take any action to transform the idea into reality.

Here is how I would characterize these several interactions with Howard. While he was aware of the "politics" of issues, the core of his concern was with substance. His attention and talent were invariably focused on the substantive issue. He had a keen desire to discover what the right thing was to do and to do it. He was well prepared, and he always followed up with a high-quality execution of whatever idea required implementation. Not much for speeches, not a lot of noble talk. He just did. This was not just his job, this was his duty. He would do it as well, as honorably, and in as straightforward a fashion as he could. If some of the causes he advocated were out of favor in the brittle world of politics, he did not apologize or even explain why he was advancing the cause or position he stood for. His expectation was that others would and should know that what he did was to fulfill the responsibility of the legal profession. His expectations brought out the best in others.

While Howard surely had passion for what he did, it was his business-like, matter-of-fact, direct approach which most impressed me. He channeled his passion, his concern and caring for others, in ways that were likely to be effective for those he sought to help. Howard possessed the qualities of a good lawyer. No cause in which he believed

was either too large or too small for his attention. For me, he is a model of the best in the legal profession.

NATHAN S. HEFFERNAN^{*}

How well I remember the time I first set eyes upon Howard Eisenberg! The occasion was the final round of the University of Wisconsin's moot court competition during Howard's time at the law school. I was a member of the Wisconsin Supreme Court panel before whom Howard and his teammates appeared. He and his team were extremely proficient in handling the legal issues—but that was to be expected. What was unexpected was Howard Eisenberg's spectacular performance in oral argument.

His personal appearance was impeccable—jet-black hair, flashing eyes, and a ready wit, yet a relaxed professional demeanor, all qualities that made him stand out even among a select group of outstanding moot court participants. I can say without hesitation, after having judged literally hundreds of moot court competitions, that Howard Eisenberg's performance was an unforgettable one. Not surprisingly, Howard's team came in first in Wisconsin and moved on to success—indeed, victory—in regional and national competition.

When shortly thereafter Justice Horace Wilkie (later Chief Justice) selected Howard as his clerk, all of us on the court were delighted. At that time, although clerks were selected by individual justices, their memoranda on pending cases were circulated to the entire court. Thus I, along with all of the other justices, had the opportunity to appraise Howard's work.

The Wisconsin Supreme Court has been fortunate in having a plethora of great law clerks, many of whom have become distinguished lawyers, judges, and legal scholars. Yet Howard Eisenberg stands in the very top echelon of our court's superstar clerks.

After leaving his clerkship, Howard for several years continued to help the court to further the cause of justice in Wisconsin. During the difficult times when the court was overwhelmed by a deluge of cases and was attempting to convince the legislature and the people of Wisconsin that an intermediate appellate court was necessary, Howard was in the forefront of those who assisted Chief Justice Bruce Beilfuss in making

^{*} The writer served as Chief Justice of the Wisconsin Supreme Court. He was a member of the court from 1964 to 1995.

the case for the new court and in getting the needed constitutional amendments enacted.

Howard later became the State Public Defender, a position that was then an adjunct of the court and one that carried a crushing caseload. Howard nonetheless handled the position with skill, dignity, and wisdom. He made numerous appearances before the court and gained the court's highest respect as an advocate. His work did much to convince the court and the legislature that a public defender's department for the entire court system was needed and was feasible.

After leaving Wisconsin, Howard gained a national reputation as director of the national public defender organization. He later turned his abilities to law school teaching and soon established himself as a legal scholar and law school administrator, finally returning to Wisconsin as Dean of Marquette Law School.

During this entire period I followed Howard's career with pride that I had known and admired him even as a law student. I would be remiss, however, if I did not emphasize Howard as a personable and friendly yet forcefully compelling personality.

Howard and I became close friends during his clerkship with the court. Howard was an attractive, likeable young man with obvious legal skill and judgment. I was not surprised that he found success in his every endeavor. I was delighted when Justice Janine Geske, my colleague who was on the search committee for a new dean at Marquette, told me that the choice was Howard Eisenberg.

Shortly after Howard arrived at Marquette he sought to enhance the relationship between the Marquette Law School and the judiciary by establishing an annual distinguished judicial residency, named after my former colleague (and former Marquette law professor) E. Harold Hallows. Howard honored me by asking me to serve as the first Hallows Fellow at Marquette. When I asked Howard for suggestions for a topic for my keynote address, he reminded me that I had always been interested in the judicial selection process—but the subject was up to me. I followed his suggestion and presented a paper urging the continuation of the non-partisan judicial election process that had served Wisconsin well for over 150 years—this despite problems created by ever-increasing costs and the ever-increasing infusion of huge amounts of money into judicial elections.[†] I am not at all sure I convinced Howard, for just this year he and his colleague Professor

[†] This paper was published as Nathan S. Heffernan, *Judicial Responsibility, Judicial Independence and the Election of Judges*, 80 MARQ. L. REV. 1031 (1997).—ED.

Joseph Kearney provided a definitive study of a recent supreme court election dominated by huge expenditures."^{††}

Unfortunately Howard's tenure as dean at Marquette was all too short. But even in that short time he continued and accelerated Marquette Law School's drive toward greater excellence, bringing in additional distinguished faculty members and in many ways enhancing the Law School's reputation in the Milwaukee community, the State, and the Nation.

Despite the onerous administrative burdens of the deanship, Howard continued to take on an extraordinary load of pro bono appellate cases, representing persons accused of serious crimes—and he volunteered his time and talents to solve some of the difficult problems confronting the Milwaukee community. Beyond all this, he somehow found the time to continue his work (which dated back at least to the time of the birth pangs of the intermediate appellate court in Wisconsin) for the improvement of the court system to ensure greater and more expeditious justice for the people of the State. This work included, upon his return to Wisconsin, assisting the Supreme Court of Wisconsin through service on its education committee and later chairing the Appellate Practice Section of the State Bar of Wisconsin. But to mention those particular matters, of course, is only to scratch the surface.

Shortly before his death Howard told me that he wished to commemorate the twenty-fifth anniversary of the Wisconsin Court of Appeals by a seminar and a series of articles appraising the new court's success and suggesting how its performance could be improved. He was particularly anxious to have the participation of those who were active in the founding of the court twenty-five years ago.

As I look back upon this rather sterile recital, I'm afraid that I have not adequately expressed the depth of my feelings of friendship and admiration for Dean Eisenberg—feelings that transcend approval of Howard as a lawyer, a scholar, and a law school administrator. He was a wise and good friend whom I miss and whom the Wisconsin court system and the State of Wisconsin will continue to miss. We have all lost an irreplaceable friend and leader.

^{††} This article was published as Joseph D. Kearney & Howard B. Eisenberg, *The Print Media and Judicial Elections: Some Case Studies from Wisconsin*, 85 MARQ. L. REV. 593 (2002).—ED.

TERENCE T. EVANS*

Horace W. Wilkie was a great judge and an even greater human being. With that, the late Dean of the Marquette University Law School would wholeheartedly agree. Wilkie became a Justice on the Wisconsin Supreme Court in 1962, and the court's Chief Justice in 1974. He died prematurely, at the age of 59, in 1976.

I was privileged to serve as Justice Wilkie's law clerk during the court's 1967–68 term. And if you clerked for Justice Wilkie, you became part of his family, and that made you want to drop in and chew the fat with him whenever you were in Madison. It was during one of my visits to the Justice's chambers, this one in 1971, that I first met his law clerk at the time, Howard B. Eisenberg. Eisenberg was fresh out of the University of Wisconsin Law School and, like the Justice he worked for, Howard was destined to die prematurely, as he did on June 4 of this year, at the age of 55. As Billy Joel would sing, "Only the Good Die Young."

A judge with a new law clerk is a little like an NFL coach with a first-round draft choice. The judge, like the coach, often wonders if the clerk will be good, average, or—perish the thought—a dud. After I first met Howard, and later talked with the Justice about him, Wilkie did not simply say he had a good clerk. He said he had a superstar on his hands, a very special law clerk indeed. The judge was effusive in his praise of the new clerk. Just think what the Justice would have said had he known of the accomplishments his young clerk would ring up over the next three decades as Howard became one of the true giants on Wisconsin's legal landscape.

By now, Howard's career is well documented and it need not be repeated here. I'll focus only on his activities in the Court of Appeals for the Seventh Circuit, the court I joined as a judge in 1995, the same year Howard became the dean of my alma mater law school, Marquette University.

There are fifteen law schools in the Seventh Circuit and none has ever had a dean quite like Howard Eisenberg. Despite his full-time duties at Marquette, and his service on countless community projects, Howard always answered the court's call to represent poor people in need of legal services. Collins Fitzpatrick, our Circuit Executive, noted, "I know of no attorney who has done more to represent the interests of

* The writer is a United States Circuit Judge for the United States Court of Appeals for the Seventh Circuit and an alumnus of the Law School, Class of 1967.

indigent defendants in our court than Howard Eisenberg. He always gave his clients the very best and was a model for everyone in the legal profession to follow." I second Fitzpatrick's remarks.

When defendants in Wisconsin, Indiana, and Illinois criminal cases exhaust all of their state remedies, lose their petitions for relief in the federal district court, and arrive at the Seventh Circuit on appeal, any hope for relief they have is rather slim. Their only ray of hope is really a good lawyer willing to pour his soul into the case. And none was better at finding some avenue of relief for these petitioners than Howard Eisenberg. Taking these cases is not a walk in the park for any lawyer, yet Howard relished the job. If there was some flaw in a case, no matter how buried it might be, you could bet Howard would unearth it.

Representing prisoners and other "difficult" clients is something most lawyers shy away from. But Howard thrived on it. As he once said, "I live for pro bono appeals." I think he took that view because he felt it was an honor to give his best efforts on behalf of those whose situations are the most dire.

Our court records show that Eisenberg accepted indigent appointments in twenty cases over the three-year period ending just before his death. That total dwarfs the number of appointments accepted by any other lawyer in our circuit. And his work was always first-rate-plus. In all of his cases, both his written work and his oral presentations were exemplary—as good as any we ever receive. In one of his cases, our Judge Cudahy observed that Howard's "numerous and dedicated pro bono representations in this court and others have been models of professional conduct."[†]

The quality of Howard's work led our court to give him the coveted Walter J. Cummings Award for Excellence in advocacy on the part of appointed counsel. Incredibly, he won the award twice, the second time in 2001. As Joel Flaum, our Chief Judge observed, "Howard was unique. When we had a tough case, and needed the best of advocates, Howard's was the first name that always came to mind. He will be dearly missed." Amen to that.

[†] Eisenberg v. United States Dist. Ct. for S. Dist. Ill., 910 F.2d 374, 376 (7th Cir. 1990).

RONALD L. BRANDT*

After graduating from the University of Wisconsin Law School in June 1972, I was hired as an Assistant State Public Defender by James H. McDermott, who had been the State Public Defender for many years. He had manned the office alone until hiring Howard as an Assistant State Public Defender in 1972, following Howard's graduation from UW and his clerkship at the Wisconsin Supreme Court. I had known Howard by reputation only—a brilliant, hard-working law student, who was head and shoulders above everybody else. Quite frankly, I was amazed that Jim hired me, when he could attract lawyers of Howard's caliber. Three days after I started work, Jim informed me that he was resigning to take a position in the Attorney General's office.

I am not sure if my memory is correct, but my recollection is that Howard and I had done nothing but exchange handshakes at that point. I do remember that in those first three days Howard wrote a brief, argued a case before the Wisconsin Supreme Court,¹ and made a trip to the Wisconsin State Prison. My biggest accomplishment in those three days was to find the law library. At that point, I believed my career as an Assistant State Public Defender was waning.

Within a few days, Howard was named "Acting State Public Defender," while the court selected Jim's successor. That afternoon, Howard came into my office and we had our first real conversation. If it is possible to be businesslike and casual at the same time, Howard mastered it. He simply sat down and told me that my job was safe and that he was eager to work with me. He then assigned almost all of Jim's caseload to me, along with my first case to be argued before the supreme court, in the October 1972 session. From that moment, I knew that I would be challenged in ways that I had never conceived. A few weeks later, the court appointed Howard to be the State Public Defender.

It wasn't Howard's assurance of job security that struck me. Rather, it was his confidence that I was up to the task and his genuine desire to

* The writer is a lawyer in private practice in Wellesley, Massachusetts. From 1972 through 1976, he served as Assistant State Public Defender in Wisconsin and, from 1976 through 1980, as Deputy State Public Defender. From 1977 to 1980, he was head of the Trial Representation Unit.

1. It was the first time I watched Howard give an argument to the supreme court. To say that it was impressive is an understatement. While Howard was an exemplary and prolific writer, his oral arguments made the case come alive. He spoke with authority, yet made the issue simple for the listener.

include me in a new adventure. For the next six months, Howard and I were the only full-time appellate defenders in Wisconsin. And I knew that I was probably the luckiest young lawyer in Wisconsin. I was working one-on-one with a person whom I and everybody else knew to be a brilliant, passionate lawyer who was dedicated to providing the best possible legal representation for every indigent client he represented. And he was prolific, writing brief after brief, many involving complex legal issues, at a speed that boggled my imagination. Howard could read a trial transcript, review the exhibits, and prepare a brief in an afternoon. He would visit a prison, see a half-dozen or more clients in the morning, find time to write a dozen clients (typing the letters himself), and be home for dinner by 6:00 p.m. At first, I could not believe the pace—then I found myself drawn into it. Our work never seemed to end, but the satisfaction from it never diminished. Howard loved his job, which was infectious.²

We often rode to the prisons together, either to Waupun or Green Bay, to see clients. During those long trips, we often talked about why we had become public defenders. Fundamental to Howard was making sure that each client got no less than all the process due and guaranteed by the Fourteenth Amendment. Guilt or innocence, while important, was not our focus. Was the case done right? If not, was the client's case prejudiced? Was the error serious enough to warrant a new trial? What could we do to make the justice system work better? Indeed, if the system fails the poorest, then how can it function effectively at all?

And so we worked. The supreme court appointed us to more and more cases, and by February 1973 Howard hired a second assistant. At about the same time, both the United States Supreme Court and the Wisconsin Supreme Court determined that due process protections attached to probation/parole revocation proceedings. Howard believed that our task as appellate defenders included responsibility for providing

2. Howard did not take himself all that seriously. There is no doubt that he loved his work, but he often saw how absurd it could be. On one occasion, he was appointed on very short notice to represent a defendant in the Dodge County Circuit Court on a probation revocation case. He drove up to Juneau, never having met the client, only to turn around and come back to the office, when the Circuit Judge prohibited him from representing the defendant, because the client was wearing a fur coat that probably cost more than Howard's annual salary. Howard was nearly crying with laughter as he told the story.

Another example of Howard's not taking himself all that seriously occurred the morning after we had had a long trip to Green Bay. He was always bringing baby photos of his children to show off. That morning, he handed me a package of photos without comment. He could be heard laughing when I yelled out upon discovering the grisly photos of a decapitation murder autopsy mixed in with baby photos.

representation in those actions, and, by 1974, our caseload was skyrocketing, which led to expansion of the State Public Defender's office. Howard convinced the Wisconsin Supreme Court to increase our budget to allow hiring five more assistants and to open a branch office in Milwaukee in 1975. For the next two years, I supervised the Milwaukee office, working with two other assistants.

Our experience as appellate defenders led Howard to the conclusion that the lack of statewide resources and of a uniform method of appointing counsel created a wide disparity in the quality of appointed-counsel services throughout the State. Feeling that even well-intentioned judges failed to provide counsel to all who might be eligible, Howard believed that the power to appoint lawyers for indigent defendants should not be in the hands of the court, but rather with an independent public defender, whose responsibility should include devising standards by which eligibility would be determined and matching a client's needs with an experienced lawyer, whether public defender or appointed private counsel. It was a vision that was the culmination of the many conversations we had on so many trips to the prisons from 1972 to 1975.

Quite honestly, I told Howard that his utopian vision would never become reality. Why would the court system give up its power to appoint counsel? The Public Defender's constituency hardly had the lobbying power to persuade the legislature to follow that course. As only Howard could do, he acknowledged my concerns, drafted the legislation, shepherded the bill through the legislature, and obtained Governor Lucey's signature to it. By 1977, the blueprint for a revolution in indigent legal services in Wisconsin was in place. Howard's passion for justice, his ability to bridge the economic issues associated with such an all-encompassing law, and his commitment to the poor were the sole reasons that Wisconsin became the first state to have a completely independent public defender system dedicated to providing the best possible representation. No other person could have persuaded the court, the legislature, and the governor to adopt such a system.

After the legislation passed, Howard asked me to assume responsibility for setting up the Trial Division. From 1977 through 1978, we opened more than thirty offices throughout Wisconsin, took over existing county-funded public defender programs, and established a system with more than one hundred lawyers which handled more than 50,000 cases annually. Looking back, it seems incomprehensible to me that, in six years, Howard took a small, two-person appellate program

and catapulted the State Public Defender's office to a multi-million dollar program dedicated to making certain that the wheels of justice turned properly, and that all who were eligible obtained the best possible legal representation.

Those six years defined what Howard was all about. Despite the crushing burden of creating a vibrant, dedicated agency, Howard carried a full caseload, as did each of the lawyers he selected to assist him in fulfilling this vision. His purpose was not to create another state bureaucracy. Resting upon the laurels of a statewide program did not interest him. Representing the clients, seeking justice—nothing else was as important. Everything that he did in those years fostered that outcome. He developed a better way of providing legal services to the indigent defendant. It was fair, and it leveled the playing field. It is a testament to his character that by the time he was thirty, Howard had redefined the manner in which public defender services were provided in Wisconsin. That this public defender system continues to provide those services throughout the State twenty-five years later demonstrates the wisdom of his vision.

I cannot adequately express what it meant to work so closely with Howard in those years and all that I learned from him. Even though we were the same age, Howard was my mentor. The years passed so quickly, but the experience defined my career and my life. Every employee of the State Public Defender was a member of Howard's extended family. As he did with me, Howard nurtured all who shared his path, leading by example. He wanted us to share that path and to love the challenge as much as he did. He demanded nothing less than one's best effort and a commitment to justice. He challenged by assigning difficult tasks. He never criticized; rather, he taught. He always carried a caseload. And so many are much better for all he did. I know that I am a better person and a better lawyer for sharing his path in those years.

ROBERT J. PAUL

Howard Eisenberg was a brilliant, optimistic, cheerful, dedicated worker and a wonderful human being. Let me claim to be one (of the

* The writer is Chief Legal Counsel for the Wisconsin Department of Public Instruction and served as Assistant State Public Defender from 1973 to 1978 and Deputy State Public Defender-Appellate from 1978 to 1980.

many) who is a better person than I believe I would have been had I not known him. We first met in 1973 when Howard was Wisconsin's State Public Defender, a time when that office was solely an appellate operation with about eight lawyers and three support staff. Having returned to my home state from law school and a clerkship, I dropped in, no appointment, resume in hand, looking for a job. He had none, having just hired five new people with Law Enforcement Assistance Administration grant funds. But when he heard I was returning from the District of Columbia, he immediately began to engage me about the evolving case law from there on competency to stand trial and the defense of mental disease or defect. He took out a brief, fresh from the printer, which he had just filed,[†] and showed me where he'd cited recent opinions and writings of Chief Judge David L. Bazelon of the United States Court of Appeals for the District of Columbia Circuit in support of his argument in the Wisconsin Supreme Court. I was familiar with the opinions, and we had an animated discussion. Three weeks later, while vacationing overseas, I received a postcard from my family saying Howard Eisenberg had called. One of the lawyers he'd conditionally hired had not passed the bar, and was I still looking . . . ?

Howard had a spirit and fire that lit the way and warmed the path of all those he encountered. And though he was an outstanding lawyer, he was completely unpretentious. In an effort to give breadth to these acknowledgments, I contacted the members of the appellate office from those early days, 1972 to 1978 (whereupon Howard went on to direct the National Legal Aid and Defender Association in Washington, D.C.). These former colleagues included Gary Kavanagh, Ron Brandt, Ruth Downs, Rich Sals, Al Whitaker, Jack Schairer, Mel Greenberg, Steve Weiss, Caroline Elias, Vicki Snell, Glenn Cushing, Steve Phillips, Chuck Vetzner, Bill Tyroler, Frank Butler, Tom Zander, and Penny (Pierce) McDonough. Each spoke of Howard's qualities of leadership, compassion, sense of humor, integrity, commanding intellect, near-photographic memory, generosity, strong faith, commitment to the poor and to community service. One remarked that Howard gave public defenders a good name by combining the zeal of a true advocate with the precision and authority of a legal scholar. Another, giving evidence of this fact, referred to instances of some indigent clients arrested after the new Howard-designed trial office had opened. Under that system staff attorneys handled most cases, but private attorneys were also

[†] See *State ex rel. Haskins v. Dodge County Court*, 62 Wis. 2d 250, 272, 214 N.W.2d 575, 586 (1974).

eligible to provide representation. It was reported that several clients, upon being advised that a private attorney would be representing them, complained that they preferred a public defender staff attorney instead, as, *contra* stereotype, jail scuttlebutt was that that representation was superior. It is an ongoing tribute to Howard's instincts with people that many of the public defender staff continue their work at the appellate office today or in other pursuits related to representing the poor, the mentally ill, or the disabled or in other service-oriented endeavors.

Everyone has at least one "Howard story." It is significant in itself that this is so. Among those mentioned was one that displayed Howard's very keen sense and appreciation for the right of every person accused of a crime to a vigorous defense. He never lost sense of who his client was or how each was entitled to his or her own independent counsel. Prior to 1978, when there was only a public defender appellate unit, Howard carried a caseload of about seventy to eighty open appellate cases in addition to his administrative responsibilities and work with the legislature. At that time, the court of appeals did not exist and all appellate work (except county court appeals to circuit courts) was in the state supreme court. With his caseload, in argument week, Howard might have six cases scheduled for oral argument. One day, as he was midway through his second argument, one of the Justices interrupted him to say, "Mr. Eisenberg, isn't the argument you are making on behalf of this client just the opposite of the argument you made in the last case?" Without skipping a beat Howard rejoined, "Oh, that was the other Howard Eisenberg!"

Doing criminal defense appellate work means losing, a lot. But this never seemed to get Howard down. It was another bright facet of Howard's personality that he leavened his work representing some of society's most dangerous individuals with the light touch of his wit. Occasionally, in talks he gave to various criminal defense, bar, and student groups back then, he would begin by saying, "I'm Howard Eisenberg, State Public Defender, which the Supreme Court thinks is Latin for 'Judgment Affirmed.'"

Someone remembered the celebration of one of Howard's birthdays which featured a "talent" show and everyone's singing the theme song from the Mickey Mouse Club TV show, substituting "Howard Eisenberg" for "Mickey Mouse."

Another vaguely recalled, with at least partial corroboration ("I wouldn't swear to it but I also seem to recall . . ."), that he once heard a voice emanating from Howard's office, arguing, with determination and significant emotion, a remote point of law. But it was not Howard's

usual voice; rather, it was the most unique and clear vocalization of Kermit the Frog.

In this age when accumulation of wealth or power is its own sufficient end, when basic civil rights and the rule of law are officially trammelled and political meanness seems even more rampant, Howard Eisenberg provided us all with a different model: one of consuming generosity, self-sacrifice, and devoted public service. He was a man of incredible energy, an acute sense of justice, and while he occasionally preached ("Do well and do good!") and, I'm sure, lectured in class, he mostly led by example, by doing.

Howard, joyful warrior, we miss you. But you and the ideals you embodied live on in those you inspired.

JACK E. SCHAIRER*

Howard Eisenberg was an amazing man. I will remember Howard most warmly for his extraordinary energy, remarkable spirit, and devotion to family, and for his unwavering and tireless commitment to helping those who are among society's most helpless and hopeless: indigent criminal defendants.

Howard's exuberance for the sometimes Sisyphean aspects of public defender work could be both inspiring and intimidating. Howard was a self-described appellate junkie. His legendary work ethic, legal brilliance, and compassionate manner with clients at times left you feeling as though you should be doing a little more, and doing it better. And usually you did. Working with Howard invariably caused you to become not only a better professional, a better lawyer, but also a better person.

Perhaps Howard's greatest legacy as State Public Defender is the agency itself. In 1972, when Howard was appointed State Public Defender at the age of twenty-six, the office existed then as an arm of the Wisconsin Supreme Court, and its three attorneys handled only appellate cases before that court. Howard drafted Chapter 977, creating the independent statewide public defender agency that marked its twenty-fifth year of existence this past July. This was no small accomplishment. Judges resisted giving up control of eligibility and appointing counsel, prosecutors feared that a monolithic defender agency would be too powerful, and some at the state bar opposed an

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agency's setting qualification requirements for its members. Howard prevailed, and his statute, his agency, set a standard that has become a model for defender programs in the United States and throughout the world. It was a proud moment for Howard when the State of Israel modeled its public defender program after Wisconsin's and in 1999 sent Israeli defenders here to train with the current State Public Defender, Nick Chiarkas, and his staff.

It is not unusual for attorneys of Howard's caliber who work in defender agencies to stay for a few years and then move on in pursuit of greater prestige or treasure. Howard did move on to be executive director at the National Legal Aid and Defender Association, director of clinical education at Southern Illinois University School of Law, Dean of the University of Arkansas at Little Rock Law School, and, of course, Dean of Marquette University Law School. But in a very real and tangible way, Howard never stopped being a public defender. While each of these jobs no doubt brought enormous challenges and demands, Howard always maintained a caseload representing indigent criminal defendants, *pro bono*. By the time Howard returned to Wisconsin in 1995, his State Public Defender statute had been changed, eliminating the agency's authority to litigate prison-conditions issues on behalf of inmates. Howard filled the void with his *pro bono* work representing individual inmates who asked for his help and by playing a key role in a class-action suit challenging, as cruel and unusual punishment, conditions at Wisconsin's "Supermax" prison in Boscobel.

After Howard's passing, a speech he had given on several occasions titled "What's a Nice Jewish Boy Like Me Doing in a Place Like This?" that addressed his thoughts on spirituality and the legal profession received press attention.[†] In it Howard took the legal profession to task for its general state of incivility and took lawyers to task for trying to win cases by being personally offensive, snide, unreasonable, and unpleasant to deal with. Howard believed lawyers have a higher calling to pursue ultimate good for society. His view of *cura personalis* meant that the Golden Rule is operative even in law offices. He urged students and lawyers, as a start, simply to be nicer, to treat people, all people, better. I can tell you this was not, as is often the case, the product of someone's looking back over his career with perhaps some regret and urging others to learn from his experience and take a better path. Howard was always this way.

Howard, somewhat incongruously for a public defender, particularly

[†] This speech is reproduced as part of this issue. See *infra* p. 336.—ED.

in the early 1970s, seemed as though he were the kind of person who had been born wearing a jacket and tie. His demeanor in the office was generally formal, but he also had a humorous side. One of his secretaries who still works in his old Madison appellate office relates that Howard dictated prodigious amounts of legal work and would often end each document on the tape by signing off with a fictitious name. In one instance the secretary typed exactly what Howard dictated. He signed it and, much to the secretary's horror, put it in the mail for filing, unknowingly, as "State Public Rhinoceros, Howard B. Eisenberg."

Howard's sense of humor was also probably critical in coping with his lifelong affliction as fan of the Chicago Cubs. I imagine that as a public defender and Cubs fan Howard must have had an affinity for St. Jude, the patron saint of hopeless causes. But even at that, Howard once said that, at some point, "You stop being a long-suffering Cubs fan After a while you become content with the little surprises they offer." Howard helped all of us who had the great fortune of knowing and working with him to recognize the little surprises this profession and this life have to offer. His death is a great loss certainly to his family and wide circle of friends and colleagues, but also to the many hundreds of men and women, isolated in prisons, whom Howard represented, providing a voice and hope.

Howard B. Eisenberg—The Foe Who Became My Friend

THOMAS J. HAMMER*

It was the decade of the '70s and he was our dreaded adversary. We had visions of him sitting in his office or in a law library parsing our transcripts to discover that nugget of error that would undo our hard-fought victories. We were the good guys and he was trying to free the bad.

Who was he? Who were we? And why was he our nemesis? "He" was Howard B. Eisenberg, Wisconsin State Public Defender. "We" were young prosecutors working in that legal M*A*S*H unit known as the Milwaukee County District Attorney's Office. We were fighting the war against crime and he was fighting to undo our battlefield victories with his powerful arsenal of appellate skills.

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Perhaps my colleagues and I (or at least I) were too narrow-minded to appreciate what Howard Eisenberg was really doing. He, too, was engaged in battle, but his was a fight larger than any one case (though it was often waged through individual cases). He was representing the poor in a society that did not value indigent defense and whose government did not adequately support it. Howard overcame the latter of these hurdles when he convinced the legislature to enact his blueprint for a statewide public defender organization that would provide both trial and appellate representation to the indigent. That accomplishment was perhaps his greatest achievement in a life devoted to the cause of the poor. The excellence of the work done to this day by the Wisconsin State Public Defender is a living tribute to Howard and what he stood for.

In 1978 Howard resigned from his position as State Public Defender to take on new challenges with the National Legal Aid and Defender Association in Washington, D.C. I recall my sense of relief, upon hearing that news, that Howard Eisenberg would no longer be scouring our transcripts and challenging our trial court successes.

Of course Howard did not really disappear from the Wisconsin legal scene. His legacy—the Wisconsin State Public Defender organization—continued to flourish. It was impossible to research significant criminal law decisions from the 1970s without encountering his name prominently appearing in the case reports as lead appellate counsel. And any research about post-conviction practice and procedure in that era always began with a look at his seminal law review article on the subject.[†]

I could not say that Howard's departure from Wisconsin affected me on a personal level. He was off pursuing new endeavors on the East Coast, and I soon left the prosecutor's office to become a law teacher. I did not miss him because I had not ever met him. But then, in 1994, his name surfaced as a dean candidate at Marquette. *What?* Could the dreaded adversary from the past be returning—and, worse yet, as my boss? As applications were winnowed and interviews conducted, Howard emerged as a formidable contender for the position. And the more I got to know him through that process, the more I liked him and the less I feared the prospect of a "Dean Howard" coming to Marquette.

[†] Howard B. Eisenberg, *Post-Conviction Remedies in the 1970's*, 56 MARQ. L. REV. 69 (1972).

For the first two years of Howard's deanship, I had the great privilege of serving as one of his associate deans. It was through that relationship and the daily interaction that came with it that I got to know Howard well. Working with him in the enterprise of running a law school was an extraordinary experience. During that process my old adversary became my new friend.

I witnessed firsthand the enormous energy Howard poured into his work every day. Though he had been away from Wisconsin for seventeen years, he quickly resurrected his looming presence on the Wisconsin legal scene, never saying "no" to an opportunity to promote the Law School, to sit on an important board or commission, to speak at a continuing legal education event, or to take on yet another appellate case for an indigent convict who pleaded for his help. This, of course, is not to mention his "day job" of running a law school.

When I returned to full-time law teaching in 1997, the frequency of my interaction with Howard changed. No longer a member of the law school administration, I had fewer occasions to be in the dean's office, but the conversations we did have there became so much more interesting. Without the burden of resolving this or that administrative problem, we tended to visit about our common passion: the criminal law.

Most often these discussions involved intricate legal issues that had arisen in one of his appellate cases. For Howard, it was usually not a matter of his clients' guilt or innocence. He was enough of a realist to know that most of them had violated the law. But it was "how" they had been convicted that concerned him. If the government intended to brand someone a criminal and punish him or her for misdeeds, it had to play by the rules. I witnessed the intensity with which Howard combed trial court records for the presence of error. I shuddered to think that he had been doing the same thing to my transcripts twenty-five years earlier.

When Howard died in June of this year, the Marquette University Law School lost a terrific dean; the legal profession lost a tremendous lawyer; a family lost a husband and father; countless indigent convicts lost the only person who would advocate on their behalf; I lost a friend. And, unlike 1978 when Howard left Wisconsin for a new position elsewhere, this time I really do miss him.

Reflections on a Champion of Justice

ESTHER F. LARDENT*

The early 1980s were difficult times for civil legal services programs. After enjoying the support of the Carter Administration and receiving substantial additional federal funding from Congress to expand into previously unserved portions of the country, the Legal Services Corporation (LSC) faced its most severe crisis in 1981 when President Ronald Reagan—a vigorous opponent of the LSC and the programs it funded during his tenure as Governor of California—proposed that the Legal Services Corporation, with an annual budget of \$321 million, be completely defunded. His attorney general, Ed Meese, agreed, suggesting that law students and pro bono lawyers could take care of the legal needs of the poor. Despite the LSC's tiny—by federal standards—budget, it had been the *bête noire* of the far right since its creation in 1974. The fact that an extremely popular President chose to focus on this little-known program signaled enormous political problems for civil legal services.

As one of the few legal services lawyers knowledgeable about and involved in the American Bar Association (ABA) at the time, I was asked to help with national efforts to secure the survival of the Legal Services Corporation, both at the ABA and at the National Legal Aid and Defenders Association (NLADA)—the latter being the organization that had long represented the interests of legal services lawyers and public defenders. I vividly remember attending my first NLADA leadership meeting to discuss a response to the crisis. The funding crisis created a tense—at times acrimonious—atmosphere. Attendees were highly vocal and divisive, except for one young lawyer who, for most of the meeting, simply sat and listened. I soon learned that that lawyer was Howard Eisenberg, the head of the NLADA and, therefore, the person at the heart of this heated debate. Howard had been a public defender before coming to lead the NLADA and, in the often-insular world of civil legal services, was viewed with some suspicion and alarm by the legal services veterans who were dominating the debate that day. I'm sure that I was viewed in much the same way. The legal services insiders were not convinced that those without a long history in their movement shared their passion for access to justice in civil matters. They were certain that outsiders had little to offer in terms

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of effective strategies for defeating the Reagan Administration proposal.

Howard proved them wrong. Despite his lack of background in civil legal services, he possessed the unique ability to understand the issues, culture, and politics of this complex community. And he quietly and effectively marshaled the resources to respond to the crisis. Howard understood that the support of the organized bar—the American Bar Association as well as state, local, and specialty bars—was essential in the effort to save the Legal Services Corporation. He worked closely with the leadership of the ABA, including its Standing Committee on Legal Aid and Indigent Defendants, to forge national and local partnerships between legal services programs and bar associations that typically had had little prior contact and, in some instances, had an adversarial relationship. He used the NLADA's resources—its publications, leadership, and conferences—to allay legal services' concerns about lawyers in private practice and to highlight and promote pro bono service, both as a tool to generate additional legal assistance for low-income people and as a means to cement political support for the LSC. Howard did so as he accomplished so many other tasks—effectively, intelligently, quietly, and with his unique brand of self-deprecating humor. Behind that low-key demeanor, as anyone who worked with Howard soon found out, was a passionate advocate, a great lawyer, and a brilliant, spiritual, and generous man.

In the David and Goliath combat over the future of the Legal Services Corporation, the little guy won. Thanks to the coalition Howard pulled together, the LSC survived, albeit with a twenty-five percent cut in funding. Howard's then-maligned strategy of forging a partnership with the bar was, we all see now, prescient. Broad-based support within the legal profession for legal services has resulted in bipartisan support for the LSC in Congress. It is no longer an endangered program. Pro bono service, despite the pressures of a more bottom-line-oriented profession, is flourishing. All of this is, in great part, Howard Eisenberg's legacy.

After losing touch with Howard when he left Washington to become an academic, I had the opportunity to spend time with him again when I was invited to be the keynote speaker at an auction and fundraiser sponsored by Marquette's Public Interest Law Society. It was a delightful time, not only because of the students' enthusiasm for public service, but also because of the opportunity to reconnect with Howard and to see how much he loved being Dean of the Law School. That evening, Howard served as the auctioneer, with all proceeds going to

public interest causes and summer fellowships. He was wonderful—funny, engaging, and very persuasive. I found myself bidding on a pig-shaped barbecue, not because I would ever use it, but because Howard made it sound irresistible. To my surprise, I had the winning bid, and, in appreciation of his skills as an auctioneer and emcee, I gave the pig to Howard. He accepted with good humor and modesty. This is my last and very fond memory of Howard Eisenberg. He will be greatly missed.

From Where I Sit

HOWARD B. EISENBERG (1980)*

The American Bar Association House of Delegates has passed a resolution supporting an amendment to the Legal Services Corporation Act which would mandate "an opportunity for substantial private bar involvement" in the delivery of legal services to the poor. While many of us within the legal services community opposed the ABA resolution, as well as the more offensive Wisconsin Bar proposal which was defeated, it might be well to reflect upon the history leading up to this action and the possible ramifications of expanded private bar involvement before condemning the ABA action. It is important that we not overreact—or underreact—to the House of Delegates' vote.

Without the support of the leadership of the bar in the ABA and NLADA, there would be no Legal Services Corporation today. While this is not to minimize the extraordinary contributions of those within the legal services community, it is to suggest that the private bar generally, and the ABA specifically, have been in the fight for legal services from the beginning. When President Nixon attempted to pack the Legal Services Corporation Board with persons opposed to legal services for the poor, it was primarily the ABA leaders who were able to quickly muster the bipartisan political clout which led to a more appropriate group of nominations. Unfortunately, the ABA must live with its image as a conservative organization responsive only to the interests of the wealthy. The fact is that in the area of legal services the ABA leadership has been with us—the legal services and client community—long before it was fashionable, and with little fanfare or publicity. It is notable, for example, that the incoming ABA President

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as well as two past ABA Presidents spoke against the resolution adopted at the Honolulu meeting of the House of Delegates, and the resolution passed by an extremely close vote (143-136).

It was unfortunate that there were two proposals before the ABA House of Delegates. The resolution passed was sponsored by the General Practice Section of the ABA, while the second resolution, proposed by the State Bar of Wisconsin, was defeated overwhelmingly. The Wisconsin proposal was for an amendment to the LSC Act which would mandate that 65% of the LSC's funding go to private lawyers in counties of 150,000 persons or fewer, and that 15% of the funds go to private lawyers in larger counties. It is clear to me, as a member of the Wisconsin bar and from reading the minutes of the Wisconsin Bar Board of Governors meetings, that this proposal was motivated by a basic opposition to federally funded legal service to the poor.

The General Practice Section, however, is different. To be sure, this group has become interested in legal services to the poor only lately, long after the matter was a high priority for ABA leadership and only after money became available from the federal government. It is also clear that the leadership of the General Practice Section lacks basic information and background regarding the structure of legal services, client involvement, the importance of impact litigation, and the conclusions of the Delivery Systems Study recently completed by the LSC.

Nevertheless, it would be a mistake to view the general practitioners as interested only in dipping into the federal treasury. There is an interest in getting a share of the money, but it must be said squarely that there is nothing wrong, immoral, or unprofessional about a private lawyer's wanting to receive at least partial compensation for representing an indigent person. Those of us who have received salaries for representing the poor are in no position to suggest that a private lawyer not receive some payment for the services provided, particularly when it is apparent that the payment will be far less than that from a retained client. Many members of the General Practice Section believe that private lawyers can provide a substantial part of legal services to the poor, and they are willing and eager to provide those services.

We should reflect on the growth of staffed legal services programs and the reaction in the bar which resulted not only in the ABA resolution, but also a number of local and state resolutions hostile to the Corporation. Clearly, there is a gap to be bridged in many jurisdictions between the private bar and legal services attorneys. The outright hostility between staff and the private bar has been allowed to fester to

a point that, combined with certain political changes, a coalition of anti-legal services politicians and anti-LSC lawyers could bring about the downfall of the Corporation. We have an obligation to educate the bar, or at least to try to do so. We have an obligation to reach out to the local bar leadership, which makes up the ABA House of Delegates, and to make efforts to involve the bar on all levels and respond to its concerns when possible. When it is necessary to make a stand in opposition to the bar position, this must be done; but it must be done when the interests of the legal services clients require it, not when the egos of the staff suggest it.

The absence of substantial staff attorney involvement in organized bar activities has not served the legal services community well. There is a direct relationship between the involvement of attorneys in bar programs and the support of that bar for the project. Clearly there are private attorneys who are so committed to the status quo and interests of traditional retained clients that they will oppose any legitimate legal services program, particularly one with client involvement. There may even be communities in which the entire bar will have to be written off as unreachable. In most places, however, there will be responsive elements within the bar that can at least neutralize the reactionary factions and quite possibly establish a strong network of private bar, client, and staff support for the legal services program.

Ultimately these questions must be asked: "What's so bad about private bar involvement? Why are we so opposed to sharing the work that often overwhelms us? Is it a real concern that the poor will not be effectively represented? Is it a concern for staff jobs? Or is it simply a turf battle?" The Delivery Systems Study supplies some of the answers to the questions of whether private bar delivery systems are viable. There is a role for the private bar in the delivery of legal services to the poor, both on a paid and volunteer basis. It is apparent, however, that a staff component is an essential factor in *every* system to assure full-service, high-quality representation. Without staff we take a step backwards to the old volunteer legal aid committees which attempted to provide services on an uncoordinated pro bono basis. This was neither effective nor efficient and actually resulted, in part, in the federal funding of legal services.

Job security for legal services staff is of great importance, and we should not be ashamed or afraid to say that. We have families and lives too. While the General Practice Section expressed concern for the underemployed general practitioner, we must support the legal services attorneys and support staff who continue to work for low wages in less

than optimal circumstances. We must preserve existing jobs and assure adequate compensation.

The unmet need for legal services is so vast, however, that there is clearly a place for the "substantial private bar involvement" the ABA supports. The national experience with private attorney programs combined with staff programs or components certainly holds substantial promise. The inability of many existing LSC programs to provide representation in many traditional cases that are of extraordinary importance to the client, but not within the priorities established by the program, suggests that there is a substantial place for private bar participation today.

In the end it may turn out that mixed systems using private attorneys with staff do not work in the provision of civil legal assistance, although these systems have worked for more than a decade in many offices providing criminal representation. It may be that the legal services and client communities must come to a parting of the ways with the private bar. In my judgment, however, it would be catastrophic to think that time has come now. The issue of private bar involvement is squarely before us and the challenge has been made. The action we now take in response to the call for more private bar participation may well determine the future for legal services in the United States. Greater private bar involvement might well expand legal services to the poor. Is the risk of private bar activity so great as to motivate us to oppose it at this juncture? I hope not.

RICHARD J. WILSON*

Howard Eisenberg changed my life. Some of the changes were dramatic and immediate, while in other instances it took longer for me to realize his deep and lifelong influence. We worked together for only a relatively short period of time, from early 1980 until Howard left the National Legal Aid and Defender Association (NLADA) in 1983. At the time, Howard was Executive Director of the NLADA, while I served as Director of the Defender Division of the association. He was my boss.

Before joining the NLADA in Washington, D.C., both of us had been appellate public defenders in the midwest, Howard in Wisconsin

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and I in Illinois. We both loved our work as public defenders, and both of us became active, as young defenders during the 1970s, in the NLADA, the national organization that supports the work of civil and criminal lawyers providing legal services to those who cannot afford counsel. We were about the same age, although he was younger and had risen further than I in appellate-defender leadership in our home states. When I met him, he was the State Public Defender of Wisconsin, and I was the director of the Springfield regional division of the Office of the State Appellate Defender in Illinois. Both of our programs had grown and thrived in the wake of decisions by the United States Supreme Court, most prominently *Gideon v. Wainwright*,¹ requiring that defendants charged with or convicted of a crime be provided with counsel at state expense if they could not afford the costs of a lawyer.

In late 1979, Howard was promoted to Executive Director of the NLADA, which left open his former position directing defender operations at the association. Howard recruited me heavily to take the job, and I eventually succumbed to the lure of Washington, D.C. I moved there in April 1980 and began work in the position that Howard had occupied before me, while he assumed his duties as director of the entire association. The first change that Howard Eisenberg brought about in my life was in creating a culture of hard work without conveying a sense that, as my supervisor, he was telling me to do anything in a particular way or by a particular time. Howard led by example, not by giving orders. No matter how early I arrived, Howard was already there. He told me once that he loved to get to work early (meaning by about 7:00 a.m.!) so that he could do the day's correspondence and other administrative tasks and planning before anyone else was in the office.

Howard also was one of the most productive managers with whom I have ever worked, possessing the ability to turn out long reports or proposals seemingly overnight. His first drafts were usually good enough that they required little revision or significant editing; his written work was simply a marvel to read. Again, he influenced me to have confidence in my writing ability and to put it down on paper right away. While I never had his gift for spontaneous organization of a large body of material, I found that my writing improved immensely during the time that we worked together, and that my own production rose significantly under his close tutelage. I never remember his telling me to do something a certain way, but I do remember his leadership, pulling

1. 372 U.S. 335 (1963).

me and others along to achieve our best in demanding circumstances. The NLADA was never a big operation, and we always struggled, as did our member offices, with the sufficiency of our resources to meet ever-increasing demands.

Just before I assumed Howard's job as director of the Defender Division, he had won a grant from the Law Enforcement Assistance Administration—one of the few grants awarded to support improvement of public defense around the Nation—to create new statewide appellate defender offices in New Hampshire, Arkansas, Iowa, and North Carolina. The target states were all of moderate size, and the model varied from state to state. Although he was enormously busy, Howard traveled with me to each of the four states to visit with the officials with whom he had begun the grant process, handing over to me the implementation in each state. Traveling with Howard was another change he made in my life. He was an intrepid and avid traveler, while I was terrified of flying. For the first few months on my new job, which would unquestionably require me to travel by air extensively, I clung to my armrests in the death grip of the fearful flier, while Howard would sit next to me, providing a model of relaxation. I don't remember complaining openly about my fears, but I know he knew, and I know he made a special effort to calm and reassure me each time we traveled together. About six months into my job, my fears of flying were over, with Howard Eisenberg as my role model once again. By the way, all of the new appellate defender offices survive until today but one—the office in Arkansas was closed down when a young governor named Bill Clinton was defeated and the new governor refused to include it in his own plan for improvement of access to justice for the poor in that state.

Both Howard and I believed, in that spring of 1980, that legal services for the poor would grow and flourish under the Democratic leadership in both Congress and the Jimmy Carter White House. However, we woke up on the day after the election in November of that year to realize that Ronald Reagan had defeated the incumbent and would be taking over in January. Because of his intense opposition to the work of the state civil legal services program, California Rural Legal Assistance, during his time as governor in California, one of President Reagan's first official acts was to seek to "abolish" the Legal Services Corporation, the national funding and organizational source for the provision of civil legal services to the poor throughout the country. Howard Eisenberg, whose entire career had focused, until that moment, on the provision of legal services in criminal cases, became one of the

leading advocates for the preservation and protection of the Legal Services Corporation, which continued to face attacks throughout the Reagan and Bush presidencies.

Legal services for the poor in civil cases survived, thanks to a powerful coalition of bar organizations and political leaders educated and cultivated by Howard Eisenberg and others who cared about access to justice for all. One would think that the crisis in civil legal services just after my arrival would have pulled Howard's time and energy away from the defender side of the association, but that was not so. During the time I was there, Howard also guided me through the process of fundraising and grant solicitation, and the NLADA grew significantly on the defender side, thanks to his abilities to pair good ideas with the right sources of funding, thus broadening the scope of our soft-money operations at the association significantly. I learned to write grant proposals with Howard Eisenberg, another skill that has stood me in good stead throughout my career.

The early 1980s, finally, were a time when the United States Supreme Court took special interest in the constitutional dimensions of the right to counsel in criminal and civil matters. During that time, the court accepted a large number of cases for review on issues involving the scope and substance of the right to counsel in both criminal and civil cases. The NLADA had played a leadership role in providing articulate and well-grounded *amicus curiae* briefs to support positions in the Supreme Court that protected or expanded the right to counsel for those who cannot afford to retain a lawyer.

Howard Eisenberg loved a good courtroom fight. Arguments on behalf of the indigent accused in criminal cases played to both his intellectual and analytical gifts, as well as to his passion for fairness. More than anything else we did together during those years, I loved working on briefs with Howard. No one saw the right path through a procedural thicket as clearly or certainly as Howard, and no one sensed the political nuance necessary to convince the Justices of the practical effects of our arguments. Our work together involved some of the toughest issues of the day, and sometimes our position prevailed in a Supreme Court that was moving to the conservative side on defendants' rights.

The first significant case in which we appeared as counsel of record for the NLADA as *amicus* in the United States Supreme Court was

Polk County v. Dodson.² That case involved the question of whether a public defender acts "under color of" law for purposes of federal civil rights law under 42 U.S.C. § 1983. Martha Shepard, a public defender, had been appointed by authorities in Polk County, Iowa to represent Russell Dodson in a state-court appeal from his conviction for robbery. Shepard had moved to withdraw from representation of Dodson on the ground that his appeal was wholly frivolous, a procedure contemplated under state court rule and prior decisions of the Supreme Court.³ Dodson had sued under section 1983 in federal district court following dismissal of his appeal.

The issue in *Dodson* deeply divided the defender community. On the one side lay the principle of access to the courts for our clients, even (or especially) when the question was our own liability for potential wrongdoing. On the other side was the principle favoring appropriate advocacy for all of our clients, grounded in the notion that a public defender's role should be no less constrained than that of the private lawyer. Both principles seemed to be true, and it seemed impossible to adopt both. However, our brief did adopt both, in a way, by arguing that a public defender's liability depends on a "functional" analysis of the role played at the time of the alleged wrongdoing. When acting as lawyer and advocate, the public defender functions in the same fashion as private counsel, while the same public defender may act as a public official in some capacities, such as the hiring and firing of staff.

Eight of the nine Justices adopted our position, one that had not been advanced by any of the parties in the litigation. As Justice Powell concluded for the majority, "With respect to Dodson's § 1983 claims against Shepard, we decide only that a public defender does not act under color of state law when performing a lawyer's traditional functions as counsel to a defendant in a criminal proceeding."⁴

A second case in which Howard and I appeared as co-counsel for the NLADA as amicus curiae did not fare as well. The case of *Morris v. Slappy*⁵ presented the Supreme Court with another opportunity to examine the distinction between publicly appointed counsel and private counsel in a criminal case. Despite its ruling in *Dodson* just two years before, the Court held that a state court had not erred in holding that a continuance was properly denied to the defendant when his original

2. 454 U.S. 312 (1981).

3. See *Anders v. California*, 386 U.S. 738 (1967).

4. *Polk County*, 454 U.S. at 325.

5. 461 U.S. 1 (1983).

public defender became ill six days before trial and a new public defender was substituted as counsel. The facts before the Supreme Court showed an adamant defendant arguing for his original counsel, while new counsel announced "ready" and was successful in gaining a hung jury in the first of two trials. The United States Court of Appeals for the Ninth Circuit had held that the federal Constitution's Sixth Amendment right to counsel implied a right for all defendants to a "meaningful attorney-client relationship."⁶ The Justices seemed intent on reaching out to strike down what they called this "novel ingredient of the Sixth Amendment."⁷ Although we attempted to argue that the attorney-client relationship is as personal to a defendant as it is to a lawyer, the Court seemed reluctant to adopt a constitutional principle that might constrain the movement of busy trial court dockets due to the unavailability of a particular public defender. Our position did not persuade the Court to our side, although some Justices concurred only in the Court's result, and not its reasoning.⁸

In these and other battles, I remember that Howard Eisenberg argued his legal positions as much from his heart as from his head. It was, in fact, that passionate intellect that made him the gifted and gentle leader that he was. Howard was an ally of all poor people for whom the courts and justice itself seemed distant and ambiguous ideals. While there were so many lessons I learned from Howard day to day, it was that lesson that abides with me still, and which I hope to pass on to each new generation of lawyers in much the same fashion he did throughout his well-lived life.

WENONA YVONNE WHITFIELD*

Howard's life and career as a lawyer, as a law professor, and as a law school administrator were guided by two main principles: first, a commitment to working for and on behalf of the poor, underrepresented, and unsympathetic segments of our society; and second, a desire to inspire others towards a commitment to excellence.

The criminal cases Howard argued stand as a continuing memorial

6. *Id.* at 10 (quoting 649 F.2d 718, 720 (9th Cir. 1981)).

7. *Id.* at 13-14.

8. *See id.* at 15 (Brennan, J., joined by Marshall, J., concurring in the judgment); *id.* at 29 (Blackmun, J., joined by Stevens, J., concurring in the judgment).

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to his unwavering belief in the underlying principles of our system of justice. He used his considerable legal talents in support of the proposition that a person is entitled to the best representation—even if the individual defendant is likely to generate little sympathy. Whenever I counsel students interested in criminal defense work, I always mention Howard. I readily admit that I couldn't be the kind of lawyer Howard was. He could represent rapists, murderers, embezzlers, thieves, atheists, and religious zealots with the same level of energy and passion as if he were representing a member of his own family. He never asked his clients if they committed the crime or if they were "worthy" of his support. He simply believed that dedication, energy, and passion were what an advocate had to use in order to make our system work.

Howard's work wasn't limited to criminal cases. His old files are full of thank-you notes for speeches and presentations he made to senior citizens, rural health care administrators, support groups for Alzheimer's, bar associations, and secondary school and university classes.

While at Southern Illinois University, Howard worked with students of all abilities. Some of the students in the clinical education program and members of the American Bar Association moot court teams that he supervised did not excel in regular classroom work. But with Howard's leadership, even the most lackadaisical student worked hard. Students could see through the things he said to how he lived his life. It was as if he said, "You must come up to my level; I'm not coming down to yours." As teachers, we all try to do that. Howard, I think, succeeded. He won students over, year after year, without flattery, without condescension. He was a demanding and uncompromising teacher who knew what he wanted to see, and he had a passionate desire to make them see it not just through him, but for themselves.

Think of the term "wizard" to describe Howard Eisenberg. While he was director of the clinical legal education program at Southern Illinois University,¹ Howard used to give a speech to new law students enrolled in the clinic. He called it his "I'm not a magician, I'm a lawyer" speech. He commented once that he used the speech to warn students not to have an overly romanticized view of what lawyers can do for their clients. But wizard as a "person exceptionally gifted or clever at a

1. Howard accepted an appointment as an associate professor and director of the clinical legal education program in July 1983. He was appointed full professor in 1987.

specified activity"² is just what Howard Eisenberg was.

Howard's legacy is that the values he taught will keep spreading to others as his former students teach, interact with clients, or give speeches to senior citizen groups. His efforts will keep spreading like a basket of loaves and fishes that never empties once you start giving it away.³

NATHAN D. EISENBERG*

I first began to understand the work my father was doing shortly after our family moved to Carbondale, Illinois in 1983. Carbondale is in the deep southern part of Illinois, about six-and-a-half hours south of Chicago. Although southern Illinois is remarkable for its scenery and natural beauty, the area is also notable for the number of prisons in the area, its coal-mining industry, and poverty.

While in southern Illinois, Dad and I did a lot of running. Dad started running when we lived in Washington D.C. as a way of losing weight and exercising. I also took up running, since it was fun and was something to do with Dad. On weekends, Dad and I would often drive to the small towns in the area and participate in local road races.

We frequently visited nearby Marion, Illinois, and ran in a number of races there. Marion is home to a particularly harsh United States penitentiary—the prison that replaced Alcatraz as the most secure in the Nation. Prisoners in Marion had included some of the most famous persons in the criminal justice system, including convicted spy Jonathan Pollard as well as John Gotti. Of course, almost immediately after moving to Carbondale (if not before), Dad began collecting clients at this nearby prison.

I remember clearly Dad's telling stories about going to Marion and the travails involved in merely entering the prison to see his clients. The fact that Dad was a lawyer did not make entry into such prisons any easier. He was still subject to strip searches, body cavity searches, and other intrusive measures to make sure that he wasn't trying to help his clients escape. Dad always joked about the visits to the prisons. He

2. WEBSTER'S NEW WORLD DICTIONARY OF AMERICAN ENGLISH 1535 (3d college ed. 1988).

3. Matthew 14:15-21.

* The author is the eldest son of Howard Eisenberg. He is a labor lawyer practicing in Milwaukee.

would later laugh off some particularly invasive search or onerous visit, talking instead about how a baffled prison guard had trouble figuring out the contents of his briefcase.

As Dad and I drove around southern Illinois, he would generally have a story to tell about some prison or some peculiar prisoner. Most of these prisoners would never be eligible for parole, and no matter how brilliant Dad's legal efforts, most would never be released. He had a whole group of cases where his sole purpose was to prevent his client from being executed.

During our weekend excursions, Dad was also able to demonstrate some of the poverty in southern Illinois. One weekend, we ran a race in Cairo, Illinois. We drove along side roads, and Dad spent a great deal of time pointing out small legal clinics in the towns and cities we drove through, where he had helped local citizens address issues such as the lack of accessible health care. After several hours, we arrived in Cairo. Cairo, a river town, has never recovered from the advent of the locomotive and, later, the automobile. After running in the race along the levees, we drove through town and Dad showed me the tracts of burned-out and abandoned buildings in the city. I still have trouble contemplating the onetime beauty of this riverside city, compared with the horrible decay of more than half a century. Compared with such problems, seeing the confluence of the Mississippi and Ohio rivers was anticlimactic.

During several trips around the area, Dad also was able to point out the effects of the dying coal mining industry in the area. Throughout the region there are numerous mines, remnants of mines, and other reminders of the area's mining past. Dad could often point to a large clump of trees and explain that the trees were covering a large, unreclaimed strip mine. We also met miners, former miners, and children of miners.

Although the coal-mining industry was in decline when we moved to Carbondale, the industry was very much on Dad's mind. While in southern Illinois, Dad spent a great deal of time working on black lung litigation. Few miners had sufficient resources to cover the bills related to their medical problems, and the coal miners in the area had great difficulty addressing both their legal problems and their medical ones. The entire time we were in southern Illinois Dad worked with these individuals to help them in any way he could.

Dad's legal efforts helping prisoners, litigating black lung cases, and providing legal services for the poor all were based out of the Legal Clinic at the Southern Illinois University School of Law. The law school

was approximately a mile from Carbondale Community High School. When I started high school and joined the high school cross-country team, I walked to his office after school for a ride home.

When I arrived at the law school in those late afternoons, the school was usually empty. The support staff was gone, and the law professors had left for the day or retreated to their offices elsewhere in the building. As a professor of law and as clinical director, Dad was entitled to two offices, one in the faculty wing and one in the clinic. He filled his professorial office ceiling to floor with case files. He always worked out of the office at the clinic.

The law clinic was different from the rest of the building. Almost always there were law students working there—working on case work, not course work. Often there was a pot of coffee on the burner and a brief printing from the large daisy-wheel printer in the copy room. Dad was almost always nearby, either working with a student on a brief or making a quick run to the law library down the hall.

Thinking back on our days in Carbondale, it is clear to me that Dad's legal work and teaching work were a natural combination. Dad was directed by a tremendous sense of compassion for those around him, and a tempered sense of reality which indicated that legal work alone can rarely solve societal problems. For this reason Dad's efforts were not limited to merely teaching law students or even lawyers. While his personal legal efforts almost always involved the most difficult, thankless, and important tasks, Dad's work was also teaching others about the purposes of law and how it could be used for good. This is how I will always remember my father.

What Makes Howard Run?

LARAINÉ WRIGHT*

Howard Eisenberg hates to wait. In between clients at the Gold Plate senior citizens' center in Du Quoin, he paces the back activity room that serves temporarily as a law office. He flips through tired volumes in the small library at the center. He helps a program director move a table. He talks to the staff. He goes for another cup of coffee.

Using time well is one of his major assets. When minutes are

* The writer lives in Carbondale, Illinois. This piece was originally published in *SIUC Alumnus*, Winter 1989-90, at 34. It is reprinted with permission.

wasted, his feelings turn sour. He must move quickly. The 1,700 clients seen by the SIU School of Law's Legal Clinic in 1989 didn't begin to explore all of the needs found among the elderly—the coal miners, the inmates, the migrants, the mentally ill, the Alzheimer's patients, and others who could use the clinic's free services.

As the clinic's director, Eisenberg manages a service that covers 3,500 square miles; that annually spends close to \$400,000; that employs four full-time lawyers, a paralegal, and three secretaries; and that involves 20 to 30 students each semester in hands-on learning of the law.

But that's not enough, he believes. "This is the oldest, poorest, most rural area in the State of Illinois. When I get in my depressed moments, which only occur two or three times a day now, I kind of feel I'm sinking in quicksand. The needs in this area are so extraordinary and the cost of delivery of service is so high that the money available can't touch it. We are doing more than any other legal service provider in Illinois, maybe in the country, and I just feel we are grossly inadequately staffed and funded. We need social workers and a hit team of lawyers who can descend on an area and really litigate these cases."

Between clients, he doesn't have time to waltz with the niceties. His opinions come both from the heart and from the realities of what he faces every day. "Our physical space in the law building doesn't meet our needs. I don't have room for closed files anymore. I don't have space to interview clients. We have twice as many law students now as six years ago, when I came here. WE CAN'T BUDGE. We're choking on our own success." He has never used his office on the second floor of the Lesar Law Building. That office is filled almost five feet high with closed files. "The clinic needs its own building. Will I get the money? Not unless some bluebird of happiness drops it on us. Those are my incredible frustrations."

At Gold Plate on this late September day, Eisenberg will see eight elderly clients or couples in two hours. Most are widows over the age of 80. Their children are now in St. Louis or Florida or Ohio. Their only real assets are their modest homes, and they live on limited incomes. They are here for wills or to transfer property; one—a retired teacher and SIU alumna—also wants a living will. She tells him with dignity and humor that she doesn't want to be kept alive through tubes and by machine.

Eisenberg's impatience between clients ends when he is with them. Intensely focused on them, he probes for information, carefully answers their questions, channels their thinking, and scribbles down the requests. He reviews with each client what the client must do and what he will do.

And he tells them to make another appointment in two weeks, when he will be back in Du Quoin with drafts of the wills or the paperwork they need to sign. His work will save each client up to \$200 in private legal fees, but there are other benefits from the service. Eisenberg knows what some of them will face in the years ahead. This initial contact may make them more comfortable in coming to the Legal Clinic with far more difficult problems later.

Several weeks before, Eisenberg was in deep southern Illinois seeing elderly clients at a similar center. One of them told him, "I have a problem with my grandson. He's an alcoholic. Last weekend he came over, pushed me down on the floor, and held a gun to my head. He demanded that I deed my house over to him."

As he talks about this client, Eisenberg cannot conceal his anger and frustration. "Some days I hear one horror story after another. There's nothing I have not heard. We've had children who have hit their parents with two-by-fours, who have come in unannounced and just loaded up all the furniture into moving vans, who have taken the washer and dryer in their pick-up truck when their mother was in the hospital."

Physical abuse of the elderly is prevalent in the United States, but the overwhelming abuse is financial exploitation, and the overwhelming source of that exploitation comes from their children and relatives. "Even today when I talk about financial exploitation, people say, 'Oh, yeah, a lot of door-to-door salesmen selling aluminum siding.' And I say, 'Yeah, but for every aluminum siding guy, we see 100 sons and daughters who are ripping off their parents.'"

Eisenberg doesn't smile too often when he recounts what he witnesses on the job. "Increased life expectancy has within it the possibility—perhaps, for some, the certainty—that at some point our older clients are going to need residential care that may essentially bankrupt them. Many have savings that are attractive to their children, and the children make a preemptive strike on the money, saying, 'We don't want you to pay the nursing home. Medicaid can pay for it'—which really means the taxpayers. *This is welfare fraud*. When I tell that to people, they are horrified that I have even said it."

Something even worse may occur. "In a percentage of the cases, the transfer of the money takes place, and the child then spends it or doesn't give it back. It's just a theft. The older people are then completely estranged from their children and have the most miserable kind of last years. They resent it and are *so angry* about it."

Most of these clients stop short of taking legal action against their

children. But some are willing to have Eisenberg write a demand letter "telling the daughter that I'm now representing her mother and that if she doesn't return the stuff by next Wednesday, her mother's going to sue." Clients who are very dependent on the people who are abusing them, however, may be "afraid that if the son gets a letter from a lawyer, he'll terrorize them or beat the hell out of them or take even more stuff. Very few clients are willing to take the next step, which is to sign a civil complaint and take it to court."

The vast majority of these cases are resolved through a compromise that the clients can live with—"not always," Eisenberg adds, "that *I* can live with. Usually our clients are a lot more forgiving than I am. I'd like to attach some of these children and relatives and caregivers to the bumper of my car and drive them from here to Elizabethtown and back." Money, says Eisenberg in an understatement, "does incredible things to people."

In southern Illinois and other rural areas, half the people who enter a nursing home are indigent when they get there. The others might spend \$20,000 to \$40,000 before they are released or die. "When I talk to senior groups, I tell them that the chances of their children's stealing their money are a lot higher than their spending \$100,000 in a nursing home. That's sort of a sobering thought to most of them."

The defeats, big and small, may be numerous, but Eisenberg has had enough successes to keep him going. "The most satisfying part is when a client says, 'I didn't know I had these choices. Everybody was telling me to do this one thing, but my gut feelings were that I should be doing something else. Now you've given me the strength to go on.'"

Social work and counseling are partners in the practice of law at the Legal Clinic. The attorneys help clients stand up for their rights and remain independent. "Much of the satisfaction we get comes from empowering older people," says Eisenberg. "If they sit back and let their son or daughter, neighbors, doctors, public aid, ministers, or Jerry Falwell try to control their lives, it will become a self-fulfilling prophecy. They have to know they can do whatever they want. If they're 75 years old and they want to marry again, then I say, 'God speed. If your children don't like it, it's their problem. *It's your life*. You have the right to be happy whether you live another 15 years, or 5 years, or 5 minutes.'"

This is part of Eisenberg's 20-minute exhortation called "You're in Control" that seems to fit all sorts of situations brought to the Legal Clinic. Part soapbox, part whip, and part sermon, the speech imparts courage to clients who are, he says, "exceedingly unsophisticated about

how the world operates."

Case One: A client complains he doesn't like the care he's received from his doctor. "I tell him, 'Go to another doctor.' He says, 'Can I do that?' People feel that Doctor X is assigned to them, and they have to go to him forever until either they die or he dies. It would be funny if it weren't so sad."

Case Two: An elderly couple wants help in dealing with a 40-year old son who is living with them. He drinks, he brings home women, he's messy, he doesn't contribute a dime for food or other expenses. "I'll ask, '*Why the hell do you let this guy stay in your house?*' Well, he's our son. 'My reply is, Tough! He doesn't have to ruin your life for the *next* 40 years!' Clients want me to wave a magic wand over Sonny Boy and make him disappear. They want me to go in with my SWAT team of child-ejectors and get this guy out. Well, life and the law aren't like that. If they tell him to get out and he doesn't, they can come to me and we can do something legally."

Case Three: Within one month a local bank has charged an elderly woman \$200 in overdraft fees. The bank has been putting a 10-day hold on the pension check she deposits on the 5th of every month. "I said, 'That's outrageous! Have you gone to the bank and asked them about it?' She said, 'Can I *do* that?' I said, 'Yes and I'll be glad to help you.' This was on a Thursday. On Friday, Monday, and Tuesday I had messages from her reporting on the progress. The bank removed the overdraft charge on Wednesday. She thanked me for giving her the courage to go to the bank. Is that lawyer work? *No!* But we solved her problem. All I did was give her my 20-minute sermon."

An elderly client brought in her grocery bill that she thought the store had added up wrong. A woman periodically complains that her neighbor is poisoning her plants. A 94-year-old man has no relatives and needs help in deciding what to do with his money. An elderly patient is so malnourished that she is mentally incompetent, and she cannot sign the form her doctor needs to insert a feeding tube into her stomach. Later, when she has stabilized, her family asks the Legal Clinic to make sure that if this situation happens again, the legal paperwork will be in place.

There is no typical client for the Legal Clinic, but there is a typical week. "We go out several days to senior sites. We meet with students and review their work. We meet with clients who come to the clinic. We have court appearances. We answer the mail, we answer the phone, we do research in the library. We teach. Last night I wrote a brief in a Social Security case, and I finished two grant applications."

Eisenberg says the University puts in much more money to its legal clinic than do many other bigger, more prestigious law schools ("That's one of the secrets of our program"). Other income comes from the Legal Services Corporation of the United States, the United Mine Workers, the Lawyers Trust Fund of Illinois, the Retirement Research Foundation, the Egyptian Area Agency on Aging, and other groups. By virtue of its receiving funding through Title III of the Older Americans Act—amounting to \$26,000 a year—the Legal Clinic must provide free legal services to people age 60 and older, regardless of their income.

"But that means," he says, "we're chasing our tails 12 months a year. We're literally handling more cases in a year than other law school clinics handle in 10 years. It troubles me." Some of his colleagues tell him he's doing too much. He should cut the caseload back to the 600 clients handled in 1983 when he came to SIU (and 400 of those were for simple wills). Colleagues tell him, "Nobody appointed you God. If the funding from the State isn't adequate, either tell the State to give you more money or stop doing it."

There are days when that advice makes sense to Eisenberg. "We're getting to the point where I'm about to say, 'We can do no more.'" Then he pauses. "But when it gets to the bottom line, I can't cut back. Probably my most deeply held conviction is that my job is to help people who are in trouble."

Eisenberg calls his job an "addiction." He pitches this word over his shoulder as he shoves open a door on his way to the parking lot. It's 8:15 in the morning. He's leaving the law school on his way to another senior citizen center and a round of appointments. "This is not early for me. This is mid-morning for me. I've been here for three hours, and I worked until 10 o'clock last night." He sees C. Peter Goplerud, acting dean, striding toward him down the sidewalk. Although Goplerud stops, Eisenberg barely pauses. Jokes and hurried conversation. Farther down the sidewalk, he buttonholes someone else and puts in a plea for a modem. He's been waiting—where *is* it? They need it. Then into his car, Plymouth Voyager—"the yuppie limousine," he says. "There's a lot of down time. I've traveled 20 miles off paved roads just to see two clients, neither of whom, it turned out, had legal problems."

If you could pin him down long enough you might get him to speak a few words of Russian. His bachelor's degree is in Russian-area studies (Northwestern University, 1968, Phi Beta Kappa). "Few words" is apt. Foreign language wasn't his great strength, he discovered, but political and social sciences were. "It seemed to me that going to law school would be a broadening experience, although when I made the decision,

practicing law didn't occur to me." He was a member of the 1969 National Moot Court championship team, and in 1970 he wrote the best brief in regional competition.

After his graduation (University of Wisconsin, Madison, 1971, with honors), he was a law clerk to Wisconsin Supreme Court Justice Horace W. Wilkie. The justice, says Eisenberg, was "a 1950's liberal, a really decent guy who had personally conservative values but who had a really deep concern about people." Through him Eisenberg gained insight into the power of the law to change things, for both the better and the worse.

Eisenberg became a Wisconsin state public defender with a specialty of representing the indigent. In 1978 he moved to Washington, D.C., as defender director of the National Legal Aid and Defender Association. The following year he was named executive director of the association. The non-profit NLADA advocates for high-quality legal services for the poor. He supervised a staff of 30, managed an annual budget of up to \$2 million, raised money, lobbied in Congress, and carried on legal work. In 1983 he burned out.

The worst part in coming to the University, he says, can be found by picking up the map. "Carbondale is not a big community," he adds with a sardonic grin, and being 50 miles closer to St. Louis would only put you in Nashville, Illinois. But the most tempting part of the law school's job offer was the bottom line: "They said I could do whatever I wanted." By 1983, the law school wasn't sure of the future of its clinic. Should it be expanded, changed, or closed? Eisenberg says he was told, "We don't care what you do with it, just make the problems go away. And that's essentially my marching orders." In the years since, the Legal Clinic has helped bring honors and students to the SIU School of Law and recognition to the University within the region.

Much recognition also has come to Eisenberg. He has briefed and argued more than 250 cases resulting in published opinions before the U.S. Supreme Court, the U.S. Courts of Appeals, and Supreme Courts and Courts of Appeals in Wisconsin, Illinois, and Florida. In 1989 he received the Governor's Unique Achievement Award for his advocacy against abuse of older adults. One of his recent grants has allowed him to train volunteers as guardians for people in nursing homes. He was the faculty adviser for SIU's 1985 and 1986 national championship moot court teams. He also spends time on legal services to those who have black lung disease, as a court-appointed attorney for prison inmates, and in the classroom.

The clinic has two main aims: to serve legal needs in southern Illinois

and to train law students. In their third and final year in the law program, students may elect to earn up to six credits as interns or research assistants.

Initially, some of the students have a tendency to treat older adults as children. Their reaction, he says, is, "'There, there, dearie, your son is just trying to do the best thing for you in taking all your money and putting it into his account.' But then they become more sensitive. If I can instill in my students the notion that there are people who desperately need legal help, that we are teaching the skills necessary to help those people, that they can come to the Legal Clinic where all the classroom work clicks, then I've done something. Then I have put out into the community some lawyers who may make a lot of money—and I hope they do—but that also can help people who are hurting."

What he will be doing 10 years from now is uncertain. "I have never sat down, although my wife would love me to do this, and figured out a life's plan."

An advocate for the poor, the elderly, and the incarcerated, Eisenberg nevertheless responds enthusiastically when asked if he could be a prosecutor. "*Yeah!* At this point in my career, I've heard it all, and I'm pretty cynical. I stopped doing public defending in Wisconsin because I could no longer believe what my clients told me. The public defender has to defend the defenseless, but I'm not always sure that's the test being used today."

He would also gladly sit on the U.S. Supreme Court. "I'd be much more conservative than most people would think," says the 44-year-old Democrat. "I have a very, very strong commitment to the rule of law. You need to look at the precedent, where the law is going and where it's been; I'm offended by judges of both extremes, liberal and conservative, who bring a political agenda to the bench."

Conversations with Eisenberg tend to return to the topic of the elderly. You work with them long enough, and "you begin to see really clear patterns—the isolation, the loneliness, the problems of widowhood for women who've never been independent and who now have to cope with being alone. And you see how *mean* people are to one another."

"Conservation of resources for older people is the single most critical legal issue. That has many subheadings—physical abuse, estate planning, eligibility for government programs." A subtext, too, concerns health care. "I can't envision a system that will provide viable options for long-term care for older people. The costs are just horrendous, and we're not prepared as a society to make the necessary

adjustments." Raise taxes, drastically cut defense spending, disallow wealthy older people from drawing on Social Security—these are all options, but they are all politically difficult.

Technology now raises a whole series of other ethical questions. "Some segments of society believe that the preservation of life has the highest value. Does that mean we expend Medicaid dollars to keep severely disabled elderly people on life support, on intravenous feedings, on respiratory? Do we give them antibiotics, do we give them nasogastric feedings, do we provide them with hydration, or do we let those people die?"

"I can't be too optimistic about the future. I think we are quickly getting to be a society of the very poor and the relatively rich. Older people who have always been self-sustaining find that in the last years of their lives they have become medically indigent and dependent on public assistance. It's a really sad way for them to end their lives."

So, he says, "You end up doing as much as you can for as long as you can. You hope the client lives long enough, remains competent enough, or has the guts enough to go through with a difficult case."

With a student in tow, he heads out in his Plymouth Voyager for another small town in southern Illinois. Learning the law in a classroom, he believes, is like learning how to practice medicine by reading about autopsies. It's very expensive to run the Legal Clinic, to cover the territory, to train the students. One of his many tensions comes from the worry that at some point someone will indeed have to say, "Enough is enough."

DOROTHY L. MACHICAO*

Rarely in our lifetimes do we have the privilege of meeting and knowing someone as extraordinary as Howard Eisenberg. I first met Howard in his office at the Southern Illinois University School of Law Legal Clinic in December 1985 when I was a student.[†] He offered me an

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[†] I was not put to the test at that first meeting: Howard once told me about a little test he applied when interviewing individuals for jobs in his department. He described how he would push an object, such as a folder on his desk, toward the interviewee. As the object got closer to the individual, he assessed how the individual responded when the object was about to fall off the desk. He observed whether the person pushed the object back on the desk, or allowed the object to fall, or commented about the situation. I do not recall whether one of those in particular was the "correct" answer.

assistantship to work in the Legal Clinic with black lung clients. I was excited about working in the clinic, and blurted out, "What a wonderful Christmas present." Howard looked at me in the curious way only he could. I did not consider the fact that he was Jewish.

Immediately after New Year's, I started working in the clinic. I knew nothing about the complicated laws pertaining to black lung claimants, and so I began studying both the legal aspects of representing these clients and the medical records of particular claimants. Howard would answer any questions I might have; however, he did not instruct me as to what I needed to do. I would sit in the hearings with him and finally was allowed the opportunity to represent claimants during their hearings.

When I first started working in the Legal Clinic, I called Howard "Professor Eisenberg." He told me that his name was "Howard" and that this was how I was supposed to address him. In looking back over the years when Howard was in Carbondale, I realize that I spent a considerable amount of time with him. We would drive to St. Louis for depositions. I would also accompany him to the senior sites to interview clients interested in obtaining services from the Legal Clinic. When Howard was in charge of the Legal Clinic, the clinic represented individuals over the age of sixty and black lung claimants, and Howard himself also represented prisoners at the federal and state prisons. He would always be in his office by six o'clock in the morning. He would make a pot of coffee and begin his work for the day. By the time the Legal Clinic opened for business at eight o'clock, Howard had completed a volume of work most people would not have been able to do in a full eight-hour day.

During the time I worked in the Legal Clinic, Howard had the opportunity to argue not one but two cases before the United States Supreme Court. Although other professors at the law school offered to listen to him practice his oral argument, he chose not to practice his presentation in the presence of anyone. I planned to attend the oral arguments, but was required to represent black lung clients in Carbondale at hearings on both occasions. I did attend one of his oral arguments before the Illinois Appellate Court. Howard's presentation was with such elegance and full knowledge of his case. Without hesitation, he answered one of the appellate judges' questions when asked to compare his case with some particular precedent. He once advised me, "Never read your opening statement or closing argument," as an opposing attorney did in one of our cases.

As I write this little reminiscence, memories of those precious few

years fill my mind and heart. I was not an exceptional student in law school. I was not on law review or a participant in moot court competition. Yet Howard gave deferential treatment to me. Howard taught ethics, juvenile law, and criminal procedure in addition to his clinic work. Howard allowed me to sit in on his juvenile law class presentations even though I was not taking the course for credit. One day, Howard mentioned that as a child he would eat crayons—to the dismay of his mother. One of the students whispered, "That is why he has such a colorful personality." When we would travel to various locations on clinic work, we would discuss religion. I am a Catholic and was raised in a German-Catholic farming community in Missouri. I had very little knowledge of the Jewish faith. Howard would explain different aspects of his religion. When my mother-in-law was fatally injured in a car accident in 1989, Howard came to the funeral home to offer his condolences to my husband and his family. I invited him to stay for the recitation of the rosary; he respectfully declined.

Even after Howard left Carbondale, we maintained communication by telephone and letters. I would always send Howard a Christmas card, and he always responded with a letter. When my son got married in 1996, I sent Howard an invitation to the wedding. Of course, he was unable to attend; however, he sent a special letter. In fact, last week as I was cleaning out various boxes and beginning to shred letters and papers I had accumulated over the years, I found the letter from Howard. In it Howard stated, "Now that I have become a Jesuit, I have to be concerned when a good Catholic family has a wedding in a Lutheran Church." Needless to say, his letter was not shredded and will have a special place in my memory book.

One thing that Howard would not tolerate was self-pity or languorousness. There was a period of time, after graduation, when I was having personal difficulty. When I spoke to him about the circumstances, he told me to stop feeling sorry for myself and to get busy. He told me there was plenty of work to do in the Legal Clinic, and I could help as much as I wanted to. I took that advice and never looked back.

Yes, Howard was a teacher and mentor. He tutored me through the bar exam. He was kind and generous with his time. But most of all, he was my friend, and I cherish the memories of the goodness of Howard.

FRANK G. HOUDEK*

As many of you know, Howard Eisenberg was a longtime, avid runner. Since this was such a big part of his life—especially while he lived here in southern Illinois—and because the two of us often ran together, I have been asked to say a few words about that aspect of his life.

Running and Howard have such pleasant associations for me that I could easily spend the entire scheduled hour of this memorial on the subject. Looking at the picture displayed behind me, for instance, reminds me of the many lunch hours during which we ran a four-and-a-half-mile loop that took us along Pleasant Hill and McLafferty roads, down Chautauqua where this picture was taken, around Campus Lake on Douglas Drive, and back to the Arena. Through all this we talked about our families, the Cubs (his team), the Dodgers (my team), colleagues in the law school (usually in a positive way), staff meetings (usually in a negative way), upcoming races, the book I was currently reading (his reading tended more toward court opinions and briefs and we usually avoided those), and pretty much anything else that came to mind. The run was followed by lunch, usually at Italian Village because it was fast and Howard always was in a hurry to get back to work. For this same reason he invariably ordered the lunch special: salad and a slice, with two large diet colas.

But since I've been told to mind the time, I have selected just two Howard running stories to share with you today. They illustrate aspects of Howard's personality that I bet will be familiar to many of you, but I tell them mainly because they make me smile when I think about them. I hope they will do the same for you.

I begin with how I first learned of Howard's passion for running. In December 1984 my family and I relocated to southern Illinois from Los Angeles when I became director of the SIU School of Law Library. Naturally the first few months were taken up with adjusting—to a new job, new house, new community, new newspaper (O.K., there are some things you never adjust to), and the like. And to snow on the ground for weeks on end, which is the way it was around here in January and February 1985. Since I didn't know the first thing about running in

* The writer is Law Library Director and Professor of Law, Southern Illinois University School of Law. These remarks were delivered at a memorial service held at the Southern Illinois University School of Law in Carbondale, Illinois on September 20, 2002.

temperatures that ranged from five to twenty-five degrees, winter put a serious crimp in my usual early-morning running routine. But the snow finally melted, spring arrived (I didn't know that meant summer was coming the next day), and with it came a return to my daily runs . . . and an introduction to Howard Eisenberg, runner.

Howard, whom up until then I knew only as the competent and occasionally brusque director of the Legal Clinic, showed up outside my office in the library one day in March with a garish-colored sheet in his hand. It turned out to be a flyer for the "Springout," a River-to-River Running Club race in Herrin, Illinois which, I later learned, was the traditional start to the racing season in these parts. "What are you doing Saturday morning?" he asked. "You ought to come to this race. It's a lot of fun. We could go together."

Now you have to understand a couple of things. First, even though I had run virtually every day for ten years since graduating law school with some unwanted extra pounds that made playing basketball a chore for me, I had never participated in a road race in my life. Races in Los Angeles during the running boom of the 1970s meant going elbow-to-elbow and knee-to-knee with hundreds if not thousands, and that wasn't for me. More to the point, though, was my bewilderment at who was delivering this invitation. There were times during his years in southern Illinois when Howard had the gaunt visage and reed-like build that is associated with the long-distance runner, but spring 1985 was not one of them. Let's just say he was looking more like a Chicago Bear than a Chicago marathoner. Was his inviting me to race some sort of joke, I wondered? He can't be a runner.

Noticing the surprise and confusion on my face, Howard assured me that he did indeed run—and run in races—all the time. "You've seen races, haven't you?" "Yes," I allowed. "Well, you know how there is always an ambulance or police car, usually with balloons on it, that trails the last runner just in case something happens?" "Yes," I answered again. "Well," he said, "I'm the runner who is behind the ambulance which is behind the person the driver *thinks* is the last runner. I'm so far back no one notices me. But I'm the only one who gets to see the balloons!" This was all said with a straight face, but then he broke into a smile, I laughed, and suddenly I had met not only Howard the runner, but, more important, Howard the accomplished and multi-talented lawyer, teacher, and administrator who was not afraid to poke a little fun at himself. (For those who are interested, no, I didn't make it to the start line for that race—I tried, but couldn't find Herrin City Park, which I assumed would be on the main drag. So my very first race wasn't until

the Appletime 10K in the fall.)

Now let's skip forward a few years to 1989 when, at Howard's suggestion, we were training for and running marathons together. To set the scene for those of you unfamiliar with the "sacred" distance, a marathon is 26.2 miles in length and often is thought of as a race in two parts—the first eighteen to twenty-two miles or so before you "hit the wall," which are "easy," and the remaining miles, which are not (to put it mildly). There are physiological reasons for "the wall," but to put it in terms we can all understand, after a certain distance the runner's body says, "O.K., enough already, it's time to quit." Unfortunately, the runner's mind insists that the race must be completed no matter what the body says, and consequently the marathoner suffers mightily for the last few miles as body and mind duke it out over who is right.

From past marathoning experience, Howard had discovered that his body was particularly adamant about stopping such foolishness, and so, like clockwork, he got violent stomach cramps and other unpleasantness about nineteen miles into every marathon he ran. He finished them of course (Howard quit? I don't think so), but he never was satisfied with his times, although in truth most people couldn't walk that distance, let alone run it in under four hours as he often did. His work ethic would not accept defeat at the hands of a mere 26.2 miles, so he put on his problem-solver hat as we trained for the Music City Marathon in Nashville, Tennessee. Since it was his stomach that complained the loudest, Howard concluded that his body was running out of fuel after three-plus hours of non-stop running. Of course we always had a "carbo-loading" dinner the night before a marathon (one of the "reasons" to run these things is the carbo-loading!), but Howard decided this wasn't enough, that he needed to eat something closer to the time his body was shutting down. And the something he chose was a PowerBar® which, according to its official website, is "high in carbohydrates, the body's most efficient source of fuel," and, "[f]or best results [should be eaten] 30–45 minutes before activity along with 8–16 ounces of water or other fluids For events that last more than one hour, eat one PowerBar® Performance Bar for each hour of activity."[†] Given that Howard's "event" was likely to last about four hours, that would be four PowerBars and a half gallon of water before the race. Since the bars have neither the taste nor the texture of Hershey bars,

[†] PowerBar, at <http://www.powerbar.com/products/performance/> (last visited Oct. 18, 2002).

this was not only unpalatable but probably physically impossible. Howard's solution: eat them during the race.

So there we were on the day before the race, driving the course, looking for places to stash Howard's precious PowerBars that both would be "safe" from curious critters and could be easily found again during the race. This was an adventure in itself, but finally we got all the bars planted along the country roads over which the course meandered, and we went off to a huge carbo-loading pasta dinner that even Tony Soprano would have had a hard time finishing.

Race day arrives and the first problem is that it's warm and humid and . . . yes, it's raining. But we're runners who have trained many months for this day, and a little weather is not going to stop us. Soaked or not, off we go. In training, Howard and I often ran together, but in racing we kept to our own pace, so the rest of the story is the way Howard told it to me. He found and ate the first PowerBar a few miles into the race without any trouble. So too with the second, though this one didn't go down quite as easily, probably because he didn't have the requisite eight to sixteen ounces of water. The rain stopped between bars two and three, but with the humidity gone, the weather turned much colder, and here's where the real trouble began. PowerBars are dense and chewy to begin with—all those carbs I guess—and the dropping temperature had made bar number three close to frozen as well. But Howard knew the dreaded mile nineteen was coming up, and he was determined to ingest this extra energy, one way or the other. So there he was, running down the road while gnawing away at this harder-than-rock PowerBar. I honestly don't remember how much he got down, but thinking about it even now makes me laugh out loud. But that's not the end of the story. He had one more PowerBar to go. The only problem is that after running that many miles, your brain doesn't function nearly as well as it normally does. And he couldn't remember where he had hidden bar number four! He never did find it and, for all I know, it's still there. Oh yes—did it work? Nope, Howard still suffered through the last six miles and was disappointed with his time. But you know what—he was out running the next morning at Touch of Nature with our usual weekend training partners, the Sunday Brunch Bunch.

Although they barely scratch the surface, I hope these stories convey a bit of the passion Howard had for running. And of the fun he found in the sport. Because despite the serious effort he put into running, which is nothing less than you would ever expect from him, it was clearly an outlet that offered something that work, his ever-present companion, could not. I was privileged and happy to be a small part of that for the

years we shared in southern Illinois, and for that I will always be grateful.

Howard Eisenberg—An Inner Light

RICHARD D. CUDAHY*

Sometimes, when a good man dies young and unexpectedly, his virtues are discovered only at his passing, when the obituaries are written. This is certainly not the case with Howard Eisenberg. His untimely death was surely a terrible shock, but what is said about him now has been said almost continuously during a good part of his adult life. His virtues have been so obvious, and the humanity from which they sprang so heart-warming, that he has seemed for many years to be a model for all of us. I mention his virtues and his humanity in one breath because he was as easy to love as he was difficult to emulate. I can offer here probably not much that is new, but only the limited perspective of a judge before whom Howard appeared not infrequently for more than fifteen years.

During his career, Howard appeared in eight appeals in the United States Supreme Court, including six as an amicus, fifty-eight cases in the Seventh Circuit, including one as an amicus, forty-five cases in the Eighth Circuit, including two as an amicus, seventeen cases in the Illinois appellate courts, and two cases as an amicus in the Florida courts (to say nothing of the hundreds of appeals he handled in the Wisconsin courts). Almost all these representations were undertaken pro bono. This is a fantastic accomplishment for a lawyer and law professor with a full-time commitment to other matters.

Howard came into my life when I was sitting in court as a member of a panel of the United States Court of Appeals for the Seventh Circuit in Chicago on a December day in 1984. Howard had driven up that day from his outpost at Southern Illinois University at the other end of the State of Illinois. His mission was to represent a prisoner at the Indiana State Reformatory who had been convicted of murder in the course of commission of a burglary at Gibson's Trading Post near Belleville, Indiana, in the early morning hours of August 10, 1970. At the time of the murder, the prisoner, Jack Riner, was fifteen years old. This was the

* The writer is a Senior United States Circuit Judge for the United States Court of Appeals for the Seventh Circuit.

first case Howard ever argued in the Seventh Circuit.

The case involved a petition for habeas corpus to set aside Jack Riner's conviction on the ground that he had been prejudiced by the admission into evidence of a jailhouse statement made by his co-defendant uncle that implicated Riner as a lookout during the burglary. In an opinion by now-Chief Judge Joel Flaum, we set aside the conviction on the ground that Riner had been denied his rights under the Sixth Amendment to confront the witnesses against him—in this case, his uncle.¹ Judge John Coffey, the third member of the panel, dissented on the ground that Jack Riner was not prejudiced by admission of his uncle's statement.

Howard Eisenberg had met with success in his first appearance in the Seventh Circuit, but the dissent must have reminded him, if he needed reminding, that success in habeas cases would never come easily or frequently. He had entered into a role where each case would call for the most highly focused application of his skills as an advocate and, even with his most brilliant efforts, he would lose far more than he could win. But Howard would not have been Howard if success came easily. With eyes open, he chose an uphill path, which he was still climbing tenaciously with no sign of discouragement many years later.

I don't remember a thing about Jack Riner, but I do remember Howard Eisenberg from that first case. His presentation was skillful, but his presence was unprepossessing—old shoe. He gave you the impression that he was deeply concerned about his client, had spent long hours studying his case, and could answer any question about it. He certainly conveyed that he was deeply committed to the cause of Jack Riner and felt that Riner had not received his due from the legal system. Howard's was not a flashy advocacy, but an urgent advocacy—taking the judges by their black robes and shaking them a bit and asking them to listen carefully. And although he took his clients seriously, he did not take himself too seriously, as his subtle sense of humor manifested.

After that first case, Howard brought many more cases on appeal to the Seventh Circuit. He kept showing up in his determined way—always conveying that it was important that his clients' misfortunes be given careful consideration. Howard seemed never to be fazed by the fact that his chances of winning were considerably less than fifty-fifty. He seemed to bring to every case the energy and commitment that he had brought to the cause of Jack Riner. I became used to the

1. See *Riner v. Owens*, 764 F.2d 1253 (7th Cir. 1985).

phenomenon of the commuter from Carbondale, constantly seeking redress for some prisoner in the state prisons of Wisconsin, Illinois, or Indiana, or in the federal Bastille in Marion, Illinois—only a few miles from Howard's campus. Marion had the highest security rating of any prison in the federal system. It was the successor to Alcatraz, and the sorry plights of its denizens could hardly be surpassed as opportunities for Howard's advocacy. Howard kept coming back, and I became used to seeing and hearing him across the bench. I was moved as much by his persistence as I had originally been moved by his sincerity. He did not become weary or bored from unrewarded trips to the judicial well. He could always project his obviously sincere belief that the case he was arguing today was even more meritorious and important than the case he had given his heart and soul to last month.

From my perspective, there was no one appearing before the court in those days with the same qualities as Howard. I remarked to my colleagues many times how his dedication to the task at hand seemed to flow across with his argument. One isn't looking for saints in the courtroom, but that is the only category that seemed fully to capture the qualities that emanated or radiated from Howard Eisenberg. He was taking these cases by appointment, without significant compensation, but he gave the impression that every one was crucially important—and precious.

Howard also appeared before me early on in *Garza v. Henderson*.² Albert Garza was an inmate at the Federal Penitentiary at Marion who performed the unusual feat of escaping and remaining at large for three days in February of 1979. He was captured after a gun battle, in which the Sheriff of Johnson County, Illinois, was struck by a bullet. The Sheriff escaped serious injury because the bullet hit his flak jacket. Garza, however, was not as fortunate and was wounded in the exchange of gunfire. He was taken to the United States Medical Center for Federal Prisoners in Springfield, Missouri, where he convalesced from February until April. While Garza was still in the hospital, an incident report was issued against him by the Institution Discipline Committee (IDC) at Marion, charging him with escape. The Committee held a hearing with Garza in absentia and found Garza guilty of escape with violence and ordered sanctions including, among other things, a recommendation of placement in the Control Room at Marion, the then-equivalent of solitary confinement. The Control Room sentence was later confirmed by a hearing in which Garza participated. He

2. 779 F.2d 390 (7th Cir. 1985).

brought a civil rights action based on the alleged failure to give him notice of the IDC hearing that was held while he was in the hospital. Judge Coffey wrote an opinion for the panel affirming a decision for the government by a magistrate judge, based on a showing of lack of injury because Garza would have received the Control Room sanction even if he had received notice of, and participated in, the IDC hearing.

One could search the books diligently and not find a defendant more generally undeserving than Garza. Yet there was Howard Eisenberg standing up for Garza's constitutional rights with as much force and commitment as if Garza had been a scoutmaster dragged from his bed in the middle of the night and thrown into a dungeon. Howard's great strength as an advocate lay in his power to make what he said sound plausible. And the basis of this strength was his transparent belief in the plausibility of his clients' cases. Not that he was naïve—far from it. He certainly did not believe that his clients were above sin—or crime. But he did believe that their rights deserved as much protection as those of more meritorious sorts—perhaps more. And this came through with great clarity during his arguments.

Howard's participation in the affairs of the Seventh Circuit continued unabated through his deanship at the University of Arkansas at Little Rock and later throughout his Marquette deanship. In the course of those developments, he took on the Eighth Circuit as well. One of his many trips to the Seventh Circuit was just last year to argue a habeas corpus case on behalf of a young man convicted of statutory rape.³ The petitioner was a counselor at a Wisconsin institution for drug and alcohol-abusing minors and was convicted of the statutory rape of a fifteen-year-old resident of the institution. The specific charge was that he had traded cocaine with her for sex. The issue was whether the victim could be cross-examined on her earlier false charges that she had been forcibly raped in another alleged incident where she had admitted to lying. The rape-shield statute did not preclude this testimony because it did not concern the victim's prior sexual conduct but rather a false charge of rape, which is an exception to matters covered by the rape-shield law. Instead, the trial judge had held the cross-examination inadmissible on the ground that its probative value did not "outweigh its inflammatory and prejudicial nature."

This strikes me as a difficult case to argue—and to win. Not only is this an issue where exceptional discretion is accorded the trier of fact, but subtle distinctions must be drawn among the various purposes for

3. See *Redmond v. Kingston*, 240 F.3d 590 (7th Cir. 2001).

which evidence of fabrication might be admitted. Here, apparently, a legitimate purpose was to show that recently the victim had fabricated a forcible-rape story to get attention—not simply that she had lied. Another difficulty here from a petitioner's standpoint was that current habeas corpus law required a determination that the state courts had made an "unreasonable" interpretation of decisions of the United States Supreme Court on the right of confrontation. All these subtleties were certainly not beyond Howard, but he had the task of communicating them successfully to a panel consisting of Judges Posner, Bauer, and Ripple. Again, he must have done a good job, because Judge Posner (who had recently taught Evidence at the University of Chicago) wrote a masterful opinion, carefully threading his way through evidentiary subtleties, appropriate deference to the trial judge, and the federal-state balance. Although I was not present at the argument, I can imagine Howard savoring the finer points and securing a victory in circumstances where he could sense justice at his side.

I did have an opportunity to see Howard in action in recent years when he undertook the representation on appeal of Isiah Kitchen, a member of the notorious El Rukn street gang.⁴ In fact, I wrote the opinion here in a difficult and close case—holding against Howard and his client, but not by much. This was the same Howard that had journeyed up from Carbondale years before. Now he was dean at Marquette and traveled only from Milwaukee, but his commitment to his clients hadn't changed a bit. It was clear that he had worked very hard in preparing his argument and he was leaving nothing to chance. And his sense of humor had survived his elevation to dean. One could only wonder how he found the time.

As noted, this was a case in which I had been assigned the opinion. I was glad that Howard had argued it since I didn't want to miss anything. Kitchen had originally been charged with a cocaine offense and with being a felon in possession of a firearm. He was convicted of both offenses, but the drug conviction was thrown out on appeal. While the case was on appeal, Kitchen filed a motion for a new trial based on newly discovered evidence; the motion was decided against him in the district court, and his lawyer failed to take a timely appeal. Now he was before us on appeal of a habeas corpus motion claiming ineffective assistance of counsel based on his lawyer's failure to take a timely appeal. Howard got himself partway to victory by persuading us that Kitchen had a right to counsel on his motion for a new trial on the basis

4. See *Kitchen v. United States*, 227 F.3d 1014 (7th Cir. 2000).

of newly discovered evidence. This was not a clear or easy point. Howard won on another important issue by establishing that the failure of Kitchen's counsel to file a notice of appeal was deficient performance.

Where Kitchen's motion for a new trial fell short was in failing to show that Kitchen had been prejudiced by the inability to pursue an appeal from the denial of his motion for a new trial. His basic claim was that his girlfriend had been coerced by the government not to take the witness stand on his behalf on the firearm charge. But the girlfriend herself in an affidavit said that she had been unmoved by any threats and was willing to testify. She did not take the stand because of problems that she might face with her Fifth Amendment privilege against self-incrimination.

The Kitchen matter was a close call for the government and one of the most important cases that Howard Eisenberg handled in our circuit. Kitchen was a high-profile gang defendant, and there had been a lot of trouble with the El Rukn prosecutions. He was a fellow that I am sure the government wanted to keep under lock and key. Howard, as usual, gave Kitchen his best effort but fell only slightly short—I am sure to the profound relief of the government.

Howard also handled two appeals from the Seventh Circuit in the Supreme Court. In both of these the Seventh Circuit was reversed. In one (*Granberry v. Greer*⁵) the decision was to the benefit of the habeas corpus petitioner (represented by Howard Eisenberg), and in the other (*Duckworth v. Eagan*⁶) the decision favored the State (Indiana). It was gratifying for Howard to have these opportunities to walk in the footsteps of Daniel Webster, Thurgood Marshall, and John W. Davis, not to mention Frank Easterbrook, and I am sure that he left the same imprint there that he has left on lesser courts.

Not all Howard's pro bono work was criminal in nature. In the early days, for example, he represented coal miners and their widows in black lung cases, which are a staple in southern Illinois. Coal miners are susceptible to pneumoconiosis (black lung), a crippling pulmonary disease caused by inhaling coal dust. There is a federal statute, the Black Lung Benefits Act, that provides compensation for afflicted miners from the coal fields. I found at least two cases where Howard Eisenberg had argued a miner's black lung appeal before a panel of which I was a member. In both cases, an Administrative Law Judge (ALJ) had awarded benefits to the miner, but the Benefits Review

5. 481 U.S. 129 (1987).

6. 492 U.S. 195 (1989).

Board, an administrative body in the Department of Labor, had reversed the awards and denied benefits. *Poole v. Freeman United Coal Mining Co.*⁷ was argued in 1989, and *Collins v. Director, Office of Workers' Compensation Programs*⁸ the following year. In these two cases, Howard Eisenberg substantially advanced the causes of his clients. In Poole's case, we simply reversed the Benefits Review Board and reinstated the finding of total disability that had been made by the ALJ. In the appeal of Collins, the matter was sent back to the ALJ to identify any evidence in the record ("or adduced by Collins if he so desires") showing that Collins's pneumoconiosis was a contributing cause of his total disability. This mandate to the ALJ does not seem at all difficult of fulfillment, and both cases look like clear victories for Howard.

My recollection of Howard in these civil cases is not as crystal-clear as my memory of his habeas corpus appeals. Of course, he had more sympathetic clients to represent (disabled coal miners as against convicts), but I rather doubt that this meant a whole lot to Howard. I suspect that he drew strength from the unpopularity of his clients. I think that he figured that hardened criminals needed his help even more than crippled coal miners. But this is just conjecture; he certainly gave the miners his best efforts, and his chances of winning were better than in habeas corpus. Then too, representation of the miners involved the rather specialized and technical provisions of the black lung statute, and I have the sense that Howard's heart was in the criminal law.

All these appearances by Howard in our court strengthened and crystallized my feeling that he was a special kind of advocate—that his commitment was not so much to those who deserved his help as to those who needed it the most. We all believe in the theory that even the "undeserving" are entitled to the protection of the laws, but I think Howard may have singled out the least worthy to test the integrity of the system. I only hope that the system passed the test, and I believe that, thanks in no small part to Howard, it did.

This brings me to the last chapter of Howard Eisenberg's career, his deanship of Marquette University Law School. I am not a graduate of Marquette, but I taught there as an adjunct in the 1960s and 1970s and have generally followed developments there in later years. I had no idea that Howard Eisenberg was under consideration for the deanship at this Jesuit law school. When I heard the news that he had been selected,

7. 897 F.2d 888 (7th Cir. 1990).

8. 932 F.2d 1191 (7th Cir. 1991).

I was both astounded and delighted. I was astounded because as an observant Jew and a graduate of the University of Wisconsin Law School, he did not fit what I conceived as the typical specifications for a dean at Marquette. I was delighted because I thought that he had exactly the qualities that ought to be sought after, particularly by a Jesuit law school. In the past, it has been my impression, although I have not done a statistical study, that Marquette Law had not looked primarily to Jews as its deans (although that faith has been strongly represented in its student body). Howard, of course, recognized this in his speech, "What's a Nice Jewish Boy Like Me Doing in a Place Like This?"[†] By the same token, I had expected Marquette to look for leadership more to its own graduates than to those of the rival school in Madison.

But, as I suggest, when it came time to select a dean, there was no better choice in the whole country than this man who had made a life work of representing the wretched. Where was there a better demonstration of spiritual values—an inner light—than in this legal scholar, who worked overtime for little compensation to vindicate rights claimed even by those whom society would regard as least worthy? Whatever can be noble about being a lawyer was exemplified dramatically in the life of Howard Eisenberg. What more could one ask, particularly for a Jesuit law school that claimed a major concern for spiritual values?

After Howard's appointment, I had the opportunity to visit the school on many occasions. Once he asked me to speak at graduation, which I thought a signal honor. We also had several sessions of our court at Marquette, where one could get a good sense of how the students were thinking. And, of course, there were moot courts, where one had the opportunity to judge student performance. On all of these occasions I had an impression of how students reacted to Dean Eisenberg. There was certainly a sense of friendliness—that they loved the man. There was also a sense that they were proud of their dean. Howard had maintained an accelerated schedule of pro bono representations at the same time that he shouldered the immense burdens of a law school dean. The students knew this and were proud of it. The faculty knew it and were proud of it. Everyone at the school seemed to know that theirs was a sort of special dean that would take the school on a path to greatness.

[†] This speech is reproduced as part of this issue. See *infra* p. 336.—ED.

It is tragic that Howard has been unable to pursue to fruition the tasks that he undertook. The Almighty does move in mysterious ways. But those of us who have known Howard in his many roles are grateful for the years that he did have with us and for the spiritual enrichment that they brought. We will miss him.

Ars Longa, Vita Brevis

MORRIS SHEPPARD ARNOLD*

Dean Howard Eisenberg's unexpected death was a personal and professional loss to all of us in the legal community. To law students and law professors, he had been a leader and mentor as dean of the law schools at the University of Arkansas at Little Rock and at Marquette. To lawyers, he had been a teacher in both the most specific and general sense. To clients, he was an inspirational example of zeal, commitment, and craft. To judges, he served as a reminder of how much difference a single dedicated lawyer can actually make in the lives of real people.

A judge's life is a full one, and there are many interesting and difficult puzzles to ponder and solve that make its rewards rich and fulfilling. But, as more than one judicial officer before me has remarked, a judge's work also involves a lot of tedium and anxiety, and reading briefs and listening to oral arguments are not always the most riveting of enterprises. That is just one of the reasons that the judges of my court treasured Howard: His briefs were literate, focused, reasoned, and non-polemical; his oral arguments were lucid, organized, and models of courtesy. I am altogether sincere when I say that we looked forward to having Howard as an advocate and to working with him in fashioning a result in his cases.

Because Howard had prodigious energy and an extraordinarily keen intellect, he prevailed in many cases. He argued forty-five cases in our court over a period of almost twenty years, most of them direct criminal appeals, state and federal habeas petitions, or civil rights cases brought under 28 U.S.C. § 1983, and he was successful in almost thirty percent of these, almost always as appellant. This is a highly remarkable record when one considers, for instance, that we reverse judgments in prisoner civil rights cases only about six or seven percent of the time. And I assure you that our clerk of court did not ask Howard to accept

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appointments only in cases that were easy to win! Just as remarkably, Howard never declined to accept a case that our court asked him to undertake, not once in twenty years.

Dean Eisenberg's habeas cases deserve special mention because he won seven of them,¹ which surely makes him the most successful habeas lawyer ever in the history of our circuit. He was successful at a rate that is fully ten to twenty times that of the average: This cannot have been the work of dumb luck, or any other kind of random good fortune. Howard was also victorious in a number of civil rights cases brought on behalf of prisoners.²

This bare statistical recitation, though it reveals a record the uniqueness of which is difficult for me to convey, does not begin to do entire justice to Howard's achievements in our court, because, as every lawyer knows, there is just as much effort and skill and craft poured into the cases that turn out to be disappointments. Lawyers, especially those who serve with little or no pay (as Howard always did), earn and receive our gratitude and admiration whatever results they may obtain. But concentrating on Howard's wins serves nevertheless to remind us of the importance of advocacy and of the efforts of the individual lawyer.

Howard gave his all to every case, even to the sure losers. He was never cynical about the legal process, though he could certainly offer some rather trenchant criticisms of it. I recall for instance a conversation with him, the substance of which found its way into one of his columns, in which we were discussing the boundaries of the concept of harmless error. I remember his rhetorical resort to the *reductio* that if that principle continued to expand we could soon expect a court to conclude that it didn't matter whether a prisoner had even gotten a trial, because his guilt was so manifest that he would surely have been convicted anyway!

When Howard was dean of the law school in Little Rock, he somehow found time to write a weekly synopsis of the work of the Eighth Circuit. He told me once that the first thing that he did when he

1. See *Walton v. Caspari*, 916 F.2d 1352 (8th Cir. 1990); *Jamison v. Lockhart*, 975 F.2d 1377 (8th Cir. 1992); *Easter v. Endell*, 37 F.3d 1343 (8th Cir. 1994); *Forgy v. Norris*, 64 F.3d 399 (8th Cir. 1995); *Holt v. Bowersox*, 191 F.3d 970 (8th Cir. 1999); *Koste v. Dormire*, 260 F.3d 872 (8th Cir. 2001), *cert. granted, judgment vacated, and case remanded by Dormire v. Koste*, 122 S. Ct. 1433 (2002), *in light of Mickens v. Taylor*, 122 S. Ct. 1237 (2002); *Moore v. Purkett*, 275 F.3d 685 (8th Cir. 2001).

2. See *Franco v. Moreland*, 805 F.2d 798 (8th Cir. 1986); *Haley v. Dormire*, 845 F.2d 1488 (8th Cir. 1988); *Hickey v. Reeder*, 12 F.3d 754 (8th Cir. 1993); *Jones v. Pillow*, 47 F.3d 251 (8th Cir. 1995); *Hobbs v. Lockhart*, 46 F.3d 864 (8th Cir. 1995).

got to the office, which he customarily did at an early hour, was to download the opinions that our court had issued the day before and read them. I remarked that by now his mind must surely have turned to mush as a result, but he insisted that he looked forward to reading the opinions with great anticipation, and besides, as he noted a little wryly, there was no telling what we might do next! Optimism and good humor were prominent in all that Howard did. His life was cut short but his work remains as a monument.

Three True Things about Howard Eisenberg
(With Apologies to Anna Quindlen)

JOHN M.A. DIPIPPA*

I met Howard in 1991 when he came to Little Rock to become dean at our law school. I was the associate dean at the time. It was August and I was in charge of orientation. Our deans gave the usually bland and thoroughly forgettable "Welcome to Law School" introduction. I informed Howard that he was scheduled to do this, and I asked him what he was going to say. Howard replied, "I'm going to tell them to keep their pants on." I laughed, thinking it was a joke. Except that—and here is the first true thing about Howard Eisenberg—he always meant what he said when he spoke about important matters.

Howard proceeded to tell the assembled students, their spouses, parents, children, and friends that if they wanted to survive law school they had to keep themselves under control. And that meant—you guessed it—to keep their pants on and to keep out of anyone else's pants! Such blunt advice caused quite a stir in the more genteel South to which Howard had come.

The next day I told Howard that some people were upset by what he said and maybe he could "revise" next year's speech. Howard was unrepentant. He told me, "I meant what I said and it was good advice." But he agreed to revise next year's speech. He kept his promise. In 1992, he advised the students to avoid "bizarre sexual practices"!

Howard and I worked closely together as most deans and associate deans do. And this is how I learned the second true thing about Howard: he loved a joke. Howard wrote memos from fictitious persons

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requesting one thing or another from various people at the law school. He created an entire community of non-persons with names such as "Lemonjello Stomaché." He often claimed that he made all major decisions only after consulting a "Magic 8-Ball" that he kept on his desk.

Howard loved to be on the receiving end of jokes, too. In 1992, we moved into a new building that featured the law school's first voicemail system. I would arrive at work around 8:00 a.m., only to find several voicemails from Howard, relaying things he needed me to do and kidding me for not being at work. One day, I discovered that I could record a message and then delay its broadcast until some time into the future. Thus, I began to record voicemails the day before and schedule them to be sent to Howard at ungodly hours of the night, no mean feat considering his work habits. Howard would arrive at the law school at his usual time, say 3:30 a.m., and he would have a voicemail from me that arrived at 2:12 a.m. or 1:47 a.m. or 3:08 a.m., complaining that he was never around when I needed him. At first, Howard apologized for not being there and worried that I was working too hard. Eventually he realized that he was being set up. Finally, one day when I arrived at the office on a morning after I left one of these messages, I found a voicemail from Howard. He said, "I don't know how you do it but I know you're not here when you send those messages because I ran down to your office this morning at 2:30 and I couldn't find you!"

Howard and I used to remark that we were a pretty unusual administrative combination for a southern law school: a Jew and an Italian Catholic. And this leads me to the most important true thing about Howard: he did God's work.

I invited Howard to come to my Law and Religion class to talk about his "theology of lawyering." Howard told the class that he didn't understand anything about theology. Rather, he said, "I am a lawyer, and let me tell you why I take the cases I do." He began to talk about the pro bono work he did. He said all the conventional things about equal justice, access to the legal system, and constitutional rights. But then Howard's face softened, his voice got quieter, and he said, "To a Jew, there is no higher calling than to do something for someone who can *never* pay you back. That is why the most important service a Jew can render is to wash a dead body. And that is why I take the cases I do. The people I represent are not dead but they are close." Howard Eisenberg was the living example of how grace works through nature. He sanctified the things he did and the people he touched. He burned with the fire of God. He was not just "doing good." He was "doing God's good." And his life—especially his pro bono representation—

was full of this good.

Howard received lots of jailhouse mail, and he answered each letter. Even if he couldn't help the prisoner, Howard treated him with dignity and respect, frequently offering personal advice. His file cabinet burst with cases referred to him by courts. Often these were the most difficult cases or clients. To Howard, each case was an opportunity to show kindness, compassion, and respect to a human being who got very little of those things from other people. That may also have been why he chose to eat a 3:00 a.m. breakfast at the nearby Waffle House with, as he said, "my friends: the pimps, prostitutes, and drug dealers."

Toward the end of my tenure as associate dean, I came into the office one day around 6:00 a.m. I planned to work a bit and then return home to take my children to school. To my surprise, Howard was not there when I arrived. He showed up a little later, greeted me warmly, and went to his office. Almost immediately after he arrived, I went home, took the kids to school, and came back about an hour later. There on my desk was a cup of coffee with a note from Howard that said, "I thought you might want this." In the press of business and my return to full-time teaching, I never got to thank him for the coffee or to return the favor. It was a small act of kindness from him—one of many—that I never repaid. Everyone whose life Howard touched has similar unpaid debts—and that is just the way he would have wanted it!

LYNN FOSTER*

Howard Eisenberg interviewed for the position of dean at my law school, the University of Arkansas at Little Rock School of Law, in January of 1991. I met him for the first time then, although our paths could have crossed before. Howard attended Austin High School, on Chicago's west side; a few years later I attended one of its nearby rivals, Taft High. At the time of his interview in Arkansas, Howard was the director of the clinic at Southern Illinois University in Carbondale, my law school alma mater and where I had briefly served on the law library faculty under the directorship of Liz Kelly. I had left SIU by the time Howard was hired, however, and so did not get to know him until he became our dean at Little Rock, in the summer of 1991.

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He assumed the deanship at an important time in the history of our young school. We were housed in two buildings a block apart in downtown Little Rock. An existing building two miles away was being gutted and renovated for us; our move was planned for the summer of 1992. It was a logical time for a major fundraising effort, and a reassessment of our mission as a school. Howard was acutely aware of these possibilities. At the same time, however, the university was suffering from financial problems caused both by lack of money and mismanagement of existing funds. These fiscal problems affected the law school, although no one was really aware of the extent of the mismanagement until Howard became our dean.

Law school faculties expect perfection from their deans. The typical law school advertisement for a dean search should read along these lines:

We want someone who will work sixteen hours a day for us (but understand and approve when we do not commit similar amounts of time to our jobs); someone who is personable and charming, successful at raising money, able to say "no" to others but not to us; someone who can teach, administer with justice and yet with mercy, deal with legislators, alumni, students, and disappointed applicants, publish, raise the prestige of our school, and last but not least be able to discern, acknowledge, and reward what we the faculty have done for our school.

No one can meet all of the expectations of a faculty with regard to a dean. And we faculty members are not always kind, understanding, or patient with deans who do not meet our expectations, although we expect kindness, understanding, and patience from our deans. Howard, of course, was not a perfect dean—no one is. But his decanal strengths far outweighed his weaknesses.

Howard came to us at a particularly challenging time in the history of our school. His list of accomplishments here is lengthy, and a few of his most important achievements are still in evidence. He presided over the successful move of the law school to a new location. He single-handedly raised significant funds for the first time in the law school's history. Perhaps most importantly, he unraveled the tangled web of law school finances and negotiated an innovative, effective financial agreement with the university administration. These achievements are commendable, but become more remarkable when one considers that during his five-year term as dean, he also argued scores of prisoner cases before the Eighth Circuit, raised faculty productivity, revitalized the Black Law Student Association, published significant articles, spoke at

numerous CLEs, and taught almost every semester.

An emphasis on practice skills is one of our law school's distinguishing characteristics. Howard was a lawyer's lawyer. He was an active, experienced appellate attorney who dedicated his talents to representing those who could not afford counsel, such as prisoners and the elderly. His commitment to service was a powerful role model for our students.

One of the most intriguing facets of Howard was his sense of humor. It manifested itself mostly in written form, and he was particularly fond of inserting fiction into the midst of dry factual reports. While our dean, he digested Eighth Circuit opinions for the local legal newspaper. Occasionally, he would insert a totally fictional opinion. At least one of them was believed by a local attorney, who called Howard in consternation, delighting Howard no end.

I was one of the few people (if not the only person) at the University who read Howard's annual reports. In 1993, I learned that we had hired a new faculty member. Howard included a brief summary about him in the faculty section of the report:

Professor Zigmoid Zignowski. Professor Zignowski joined the UALR faculty in June of 1993, specializing in Public Law. He previously served as Legal Counsel to Mother Theresa. His 27-volume treatise on "Everything Anyone Ever Needs to Know About the Law Forever" is now in its 17th edition. Professor Zignowski had been nominated to the Supreme Court of the United States by President Clinton, but he withdrew his name from consideration when he accepted the offer at UALR. In addition to accepting the position in the Law School, Professor Zignowski has also agreed to become Superintendent of the Little Rock School District and Director of the Arkansas Department of Corrections. Professor Zignowski will be a very important addition to the Law School.

In 1995, I discovered yet another reclusive colleague whom I somehow had not met:

Professor J. Arnold Navelgazer received the Rube H. Goldberg Award from the National Association of Home Appliances for his pioneering work entitled "Legal Retrogressive Analysis Projecting the Anticipated and Unanticipated Consequences of the Disutility of the Slide Rule." Professor Navelgazer delivered the paper at the NAHA's annual meeting in Canton, Ohio in April, 1995.

Ars longa, vita brevis. Wherever you are, Howard, I know you still

have your sense of humor. Thank you for sharing it with us, and for all the energy you spent on our behalf. We won't forget you.

BETSY JOHNSTON*

Howard B. Eisenberg was a lot of things to a lot of people. There is no shortage of students, law professors, practicing attorneys, judges, or federal inmates who will readily volunteer the countless ways in which Howard helped them. He was a tireless advocate for more people and more causes than any one of us probably realized. He couldn't (or wouldn't) tell people "no"—a character trait from which we all benefited, but which likely contributed to his early death. Howard Eisenberg was my law school dean, professor, moot court coach, mentor, conscience, sounding board, trusted advisor, and role model. It is impossible to miss the impact he had on his clients and the legal community as a whole. There was nothing he couldn't do, nothing he didn't know. I was impressed enough with the sheer volume of his appellate work, but I was truly inspired by the quality of representation he provided every client. To be honest, though, the trait I loved most about Howard Eisenberg was his healthy (and sometimes irreverent) sense of humor.

I started law school at UALR in Dean Eisenberg's first year there. I remember the first time I met this new dean. It was during the week of orientation, when all of the incoming students were gathered in the law library of the old building. We were waiting for him to address us for the first time. I expected the Dean to put the fear of God in us and then disappear into an administrative role, to be seen again only at ceremonial functions and fundraising events. That is not what he did. Instead, he told us that each of us was there because we deserved to be, and that relatively few law students had ever *actually* flunked out of law school. He encouraged us to take care of ourselves, and assured us that the grades we would make in law school did not necessarily predict our future success as, or qualifications to be, lawyers. Then he warned us of the distractions and potentially hazardous behaviors that the stress of law school can bring and cautioned us about becoming encumbered by such temptations. He told us that if we could "keep our pants zipped," we had "a pretty good shot at making it through law school." As long as he was at UALR, he continued to give that same advice during

* The writer is a public defender in the State of Arkansas.

orientation in a speech that became affectionately known by students and faculty as "the zipper speech." I immediately appreciated this dean whose first advice to us was to be careful with whom we slept.

Dean Eisenberg also announced his "open-door policy" during that first meeting. His office door literally stayed open for students or faculty to drop by with concerns or complaints, or just to visit. Even more important than his willingness to visit with students and listen to their concerns was the honesty with which he responded. His sometimes "brutal" honesty was something about his personality that I appreciated, even if it was directed at me. The students took note that there was no hidden agenda when you dealt with Dean Eisenberg. If you asked for his opinion, you got exactly that. His words could be taken at face value, and no topic was out of bounds. Perhaps some of the faculty didn't appreciate this straightforwardness (they didn't confide in me, one way or the other), but the students certainly did.

His relationship with the students was the product of more than a passive open-door policy. He sought us out. He made a concerted effort to involve himself with the students in their leisure time. It wasn't unusual for him to join us at a local bar for "happy hour." Even more, every year between the end of final exams and graduation, Dean Eisenberg led a group of interested students to Chicago. He proselytized, seeking to make Cubs fans out of all of us. He took time to show us around the city and made sure we experienced some of the best parts: deep dish pizza, Lou Mitchell's and Ann Sathers for breakfast, the public works of art, the Art Institute, Navy Pier, the Lincoln Park Zoo, Buckingham Fountain, the old water tower, and my personal favorite, the Italian Beef sandwich. The list goes on with one very obvious exception: we never went to Comiskey Park. I wonder why! I came to love Chicago and, to this day, I believe that the "friendly confines of Wrigley Field" are sacred ground.

Just as the Dean liked to do things with us, we relished the rare opportunity to do something fun for him. One year, a number of students and faculty spent a few hours blowing up balloons for his birthday surprise the next day, and we filled his office with them. We also set up a mechanical parrot who, when activated by the noise of the Dean's unlocking and opening his door, would hopefully squawk "Happy Birthday, Happy Birthday" while it flapped its little wings. The next morning, we surprised the Dean at 6:00 a.m., joining him at the Waffle House for breakfast. After a round of pecan waffles, we followed him down the street to the law school. As the Dean unlocked the door to his office, sure enough, the stupid parrot made his birthday

proclamation right on cue! I will never forget the smile on his face when Howard turned around and looked at us. He expressed both joy and embarrassment that we had made a fuss over him on his birthday. Even before he turned on the light and began happily wading through the knee-deep balloons to his desk, we knew that we had pulled off a nice surprise for the Dean's birthday. What's more, we were pretty proud of that parrot! Later that morning, I am told, Howard caused quite a scene when, with wild-eyed enthusiasm, he popped every birthday balloon by stabbing it with his letter opener.

When Dean Eisenberg announced that he had accepted a job at Marquette, I assumed that our friendship would fade, that his influence on me and my career would wither away. Howard Eisenberg took the time and made the effort to insure that neither of those things happened. E-mail was a favorite and regular means of communication. Even as busy as he was, we did manage to meet about once a year. I genuinely cherished those reunions, usually held over drinks and a nice dinner. I would report my victories and defeats and he would report his. We'd harass each other for awhile and laugh at Republicans or White Sox fans, or any other easy target over Bombay Sapphire martinis. I felt reaffirmed because this brilliant, important man was interested in what I had been doing and could offer a helpful perspective. He felt free to say all of the things that he might have kept to himself around more "respectable" company.

He confessed to me at our last dinner together that he had, in fact, "sold out" as an attorney by taking on a couple of civil cases for money, though he smirked while he assured me that he didn't go cheaply. I love that he called me "zoftig," intending it to be a compliment, and then, having thought better of it, tried for months to convince me that it didn't mean "fat." I love that when Berta Fandino and I blew off a class and brought him back a purple dinosaur that we had won playing skeeball, he named it "Deano" and kept it on top of his computer monitor. I *really* loved that years later, when I looked up Howard's biography on the Marquette website, I saw the back half of Deano behind Howard's head in the picture, still sitting on his computer monitor. It honestly never occurred to me that Deano would've made the move to Milwaukee, but I still laugh every time I think of that cheap, goofy dinosaur sitting on his computer. I loved that Howard could make an argument every spring without fail that the Cubs were, in fact, going to win the pennant that year.

Howard was incredibly generous with his time and expertise. I am a criminal defense attorney largely because of his influence and his

willingness to involve me in a few of his Eighth Circuit Court of Appeals cases. He taught me the value of criminal defense work, even when our clients are difficult and unpopular. He convinced me that it is "the Lord's work." Sadly, there were too many facets of Howard Eisenberg that I never explored. I assumed, as did many, that there would be plenty of time for Howard to teach me all that I didn't know about appellate work. I put off discussions of our faiths, opting instead for lighter, more amusing topics for our reunion dinners. I am very grateful for the time that I knew Howard Eisenberg, I am proud to have been his student, and I am honored to attempt to continue his work. Ultimately, though, I am most happy to have called him my friend.

ALAN B. MORRISON*

Unlike most of the submitters for this special issue of the Law Review, I was never a student of Howard Eisenberg, nor did he and I ever work together in the same law school or law office. My sole contact with Howard was our membership in the American Academy of Appellate Lawyers, an organization of lawyers who devote a substantial portion of their practice to appellate work and who are judged by their peers to have considerable expertise in the area.

One of my interests in joining the Academy was to bring about changes in appellate practice that would benefit the courts, practitioners, and clients, an interest shared by Howard. I proposed that the Academy undertake a project to consider the issue of whether the current standards for interlocutory appeals in the federal courts made sense—not exactly your hottest topic in the legal world, or even the appellate legal world. Howard volunteered to work with me on the project, a trait that I subsequently learned was vintage Howard, for whom there was apparently no task for which he could not find some additional time. As I recall, he was about to leave the deanship of the University of Arkansas Little Rock Law School and head to Marquette, but that did not stand in his way. In fact, after we sketched out how we were going to proceed, Howard undertook to do the research and the first draft of a memo that was to be presented at one of the Academy's meetings.

The draft was an enormous help, both because of its completeness

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and because it gave us a framework to move ahead. At that time, the laboring oar was given to me, not because Howard was too busy or wanted to get rid of it, but because it was simply unfair to him to let him do so much when I was doing so little.

The story of how we finally got the approval of the Academy board and the membership, and how the report was turned into a law review article,[†] is a long and not terribly interesting one. What was important to me was that, at every turn, Howard was ready to do whatever it took to move the matter ahead, even while he was being a dean, a teacher, and a practitioner. My favorite Howard story about this project was the time that he asked me if he could have until the end of the weekend to review the latest changes because he had three pro bono criminal appeals briefs to file before then. Beginning with his original draft, his ideas were right on the mark, and his suggestions always improved our work. And, oh yes—and unlike many academics and even some appellate practitioners—Howard did not feel compelled to impose his style and thoughts on every sentence you wrote.

Howard was a warm, thoughtful, and generous man. I was fortunate to have known him and worked with him. All of us will suffer from his loss, especially those who never had a chance to know him.

SCOTT MCCALLUM*

Howard Eisenberg was a man of integrity. During his lifetime, he earned an outstanding reputation, not only for his numerous accomplishments as Dean of the Marquette University Law School, but also as a dedicated public servant to the State of Wisconsin and the Nation as a whole. It was because of this honorable reputation that I turned to Howard in the midst of a difficult and disappointing situation for our great State.

As most have probably heard by now, Wisconsin government has been under the spotlight over the past year resulting from a series of investigations into allegedly illegal political activity in the state legislature. Unfortunately, Wisconsin, a place in our country where ethics in government have long been the standard for the Nation and the pride of its citizens, is slowly being tarnished.

[†] Howard B. Eisenberg & Alan B. Morrison, *Discretionary Appellate Review of Non-Final Orders: It's Time To Change the Rules*, 1 J. APP. PRAC. & PROCESS 285 (1999).

* The writer is Governor of the State of Wisconsin.

As Governor, I wanted to take action to fight back against corrupt government activities. My first step was to form the Task Force on Ethics Reform in Government and, without hesitation, I appointed Howard Eisenberg to be co-chair of the Task Force. I was confident that Howard's leadership and strong moral code were exactly what our State needed to rise up out of its current struggles. Unfortunately, the State was not given the opportunity this time around to benefit again from Dean Eisenberg's knowledge and experience, as Howard passed away shortly after taking on this arduous task. Nevertheless, in the short time I knew Howard, I came to understand him on a much better level. By his comments and demeanor, I knew I had picked the right person—a man who was not afraid to speak his mind and who accepted his newly assigned role with determination, motivation, and dedication.

As so often happens, you learn more about a person after he is gone and wish you had had the opportunity to get to know him better during his lifetime. Dean Eisenberg was not only a successful professional in the legal world, but a man with a strong heart, kind words, and the desire to help as many people in the world as he could. Howard's pro bono work as a lawyer was legendary and will be a continuing example to lawyers in Wisconsin; I am told that his ability to articulate the standards for lawyers practicing law will not soon be forgotten. His work as chair of the committee set up by the Archdiocese of Milwaukee to review problems in the priesthood was just another example of Howard's courage to confront difficult issues head-on with the tenacity to tackle whatever lay ahead. I have spoken with numerous Marquette University Law School graduates who have told me that Howard's leadership has taken the school to a completely new level of achievement and excellence. Howard Eisenberg—the dean, the professor, the attorney, and the man—has undoubtedly touched the lives of more people than we will ever know.

Speaking on behalf of the people of the State of Wisconsin, we are grateful to have had Dean Eisenberg among us for so many years. We thank him for his example, his scholarship, his generous heart, his diligence, his honesty, his sense of humor, and, above all, his willingness and generosity to take on the tough problems of Wisconsin.

Dean Eisenberg has left his mark and this State has been blessed, for we have been fortunate enough to know and learn from one of a kind.

Howard Eisenberg—My Colleague and Friend
SHIRLEY S. ABRAHAMSON*

Howard Eisenberg touched many lives. I knew Howard throughout his various legal careers, beginning when he was one of my students at the University of Wisconsin Law School over thirty years ago. I was fortunate that our paths crossed often in the ensuing years, whether at particular events or in phone calls and correspondence. After law school, we met when he appeared before the supreme court as the public defender. Then when Howard was executive director of the National Legal Aid and Defender Association in Washington, D.C., we worked together on continuing legal education. On his return to the law school world, we talked about legal education (and of course about our spouses and children). I participated with him in various activities at Southern Illinois University School of Law, where he was on the faculty, and gave a commencement address at the University of Arkansas Little Rock Law School when he was dean there. When he returned to Wisconsin to be the Dean of the Marquette University Law School, he and I understood that we would be on one another's "call frequently list." I would speak with law students and attend university functions (mostly dinners where the food was surprisingly good).

With his return to this jurisdiction, the gem of a dean was back before the Wisconsin Supreme Court, this time as appointed counsel in pro bono appeals. His briefs and arguments were excellent; the nature of the appointments he took meant that his win-loss ratio was not. He was on everyone's "call frequently list."

Howard and I both thought the law schools, the bar, and the courts should have strong ties. He personally (not through a designee) served on the court's Board of Bar Examiners, diligently coming to meetings and finishing his service on the Board as chair. Howard took the task seriously and raised the tough issues that face the board and court in the examination process and in evaluating moral character. When the court needed someone to serve as a member of a committee or as a reporter or staff person, Howard would find someone to do the job.

If I wanted to bounce an idea off someone about broad administration-of-justice issues, such as serving unrepresented persons

* The writer is Chief Justice of the Wisconsin Supreme Court and has been a member of the court since 1976. She previously was a professor at the University of Wisconsin Law School and practiced law in Madison, Wisconsin.

or increasing lawyer pro bono activities, Howard was a good person to talk to. The best time to reach him was Sunday morning. I knew he would be in his office—he worked all the time. I felt bad taking his time, because he was working too hard on too many projects. But that didn't stop me from calling him. He was smart. He had broad and varied experiences. He had good common sense. Furthermore, Howard was deeply concerned about these issues. He was always enthusiastic about figuring out solutions to problems. Just as important, he was fun.

Howard and I shared a deep and abiding belief in the need to ensure that all persons have meaningful access to the legal system. Had he been here, he would have cheered me on when I sat recently as a small-claims judge and saw firsthand the problems of poor and unrepresented persons, along with the difficulties a trial judge in this fast-moving, busy court faces when she does not have the benefit of arguments by counsel.

I considered Howard Eisenberg not only a colleague, but a good friend as well. I knew him as a man of deep feelings—for his family, his faith, and his work. As impressed as I was with the depth of his convictions, his intellect, his capacity to work long hours, and his facility in working with so many different people on so many different issues, what impressed me even more was his ability to maintain a sense of perspective. His wonderful sense of humor and appreciation for irony were what allowed him to carry the heavy loads he so willingly assumed without appearing overly burdened.

By force of his hard work with the faculty, students, and central administration, his commitment to pro bono work, and his efforts to bring alienated alumni back into the fold, Howard Eisenberg helped to make Marquette Law School a more vital part of the Milwaukee community and the State's legal system. Great praise is due him and the rest of the law school community for this accomplishment.

Howard was doing what he chose to do. He was living his life according to his ideas and his religious tenets about how good people who are lawyers should conduct themselves. Many of us entered law school with the idea that we would someday be Atticus Finch of *To Kill a Mockingbird*—a dignified lawyer, standing firmly on the noble principles of a fair, just legal system for all, selflessly defending the oppressed. Howard Eisenberg was one lawyer who truly achieved that goal. By living up to the ideals embodied in the fictional Atticus and in his own religious convictions, Howard allowed each of us to feel better about ourselves and our profession. That is why weeks and months after his death people are still gathering to tell Howard stories and to

comfort each other. Wisconsin will grieve Howard Eisenberg's passing for a long time.

Shalom, my friend.

ROBERT A. WILD, S.J.*

Howard Eisenberg was a great dean, one of the greatest deans in the history of the Marquette University Law School. His efforts to build up and give greater stature to our Law School were widely admired and much appreciated. In his seven years as dean, he increased enrollment, strengthened the academic quality of the student body, developed a culture of greater scholarly productivity among our faculty, attracted to the school a very capable and energetic group of younger faculty, increased fundraising as no other dean had managed to do before him, and made our alumni excited and proud of their school and its progress. All this alone would be reason enough for Marquette University to celebrate his memory with profound gratitude. But Howard Eisenberg was also a truly splendid human being, a *mensch* in the very best sense of the word. And, if anything, who he was as a person had even more impact for good than all I have listed above.

My first contact with Howard Eisenberg occurred shortly after I became president in June 1996. He sent over to me a letter that he had drafted in my name that he wanted to include in the upcoming issue of the annual Law School Bulletin, and he was asking me to edit and give approval to that document. I read it over—it discussed the character of Marquette's Jesuit identity and mission and reflected on how this could be implemented at the Law School. In reading it, I found myself to my surprise agreeing with almost every word Howard had written. So I phoned him and asked whether he had had any help in producing this letter, but his answer was no. "Well," I said to him, "this is really good, this really catches what I think we are trying to do here at Marquette in terms of our Jesuit and Catholic identity." And indeed it did.

Howard, I soon discovered, was a passionate advocate for the Jesuit mission of Marquette. He later told me in words that I often found myself repeating to others, "Marquette's identity should not be something generic, 'Judaean-Christian' or whatever. Let it be what it truly is—Jesuit and Catholic—but please include people like me who want to be part of this mission." Howard Eisenberg was Jewish,

* The writer is President of Marquette University.

committed to his tradition and his religious faith. He was not about to become Roman Catholic or anything else. But he thought it very important that, as an institution, we be true to our identity, and he worked to ensure that for his area of responsibility, the Law School, this would be the case. Academic excellence is, of course, an essential aspect of Jesuit education, and I have already mentioned ways in which Howard worked to enhance the academic quality of our Law School. As a corollary, Howard sought, as do all law deans, to inculcate in students a deep respect, even a passion, for the law. But he also wanted the men and women who would graduate from the Law School to have a passion as well for seeking and achieving genuine justice through their professional work, for accomplishing what is right and good. He desired as well that these future lawyers be motivated in their legal careers by a commitment to the genuine service of others, especially to the service of the poor, the marginalized, the voiceless in our society. This commitment in turn should spring from another characteristic that he viewed as essential for dedicated and capable lawyers, namely, a deep respect for the human dignity of anyone with whom they have dealings and a corresponding willingness to be attentive and responsive to his or her needs. All these values, values which have been at the heart of Jesuit education for centuries, Howard energetically sought to inculcate more deeply in the culture of our Law School, and, I would underscore, what he urged upon others, he most assuredly put into practice in his own life.

How extensively Howard did this is something amazing to consider. I think, for example, it was not until he died that we learned how extensive his own personal involvement had been with prisoners and other clients very definitely situated on the margins of society. As is well known, his entire legal career was marked by a profound commitment to the proposition that everyone accused of a crime deserves a competent legal defense, and to the end of his days he extended this sort of legal counsel on a pro bono basis to a vast variety of individuals who were without the means to compensate him for such efforts. And if he encouraged others to be attentive to individuals and their needs, he himself had an open-door policy for all who sought his counsel and help. Yes, to the initial disbelief of many, Howard really did keep his office door propped open, and through it there came a steady stream of students, clients, alumni, faculty, and staff, people from every level of society who wanted a word with him. There his visitors found not only the traditional Jewish mezuzah fastened to his doorpost, but also on his office wall a Christian crucifix, Howard's own way of

expressing his respect for Marquette's religious identity and mission as a Catholic institution. Howard also found time in his intensely busy schedule to deepen his study of the Jewish Torah, a religious activity at the very heart of Judaism, though members of his family joked that Howard did this in part so that he would be better equipped to win more arguments with his rabbi!

Howard's passion for justice did not simply extend to those outside of the University, but also led him to be a passionate advocate for justice within the institution as well. If he saw something that he felt was not right or proper, particularly if it was a viewpoint shared by his fellow deans, I could count upon him to be an amazingly forceful advocate for change. To be truthful, there were moments when Howard's advocacy became so outspoken that we in senior administration sometimes threw up our hands in frustration. Yet even at such moments, we knew full well that to dismiss his views without giving careful consideration to the problems he raised would be a rather foolish course of action. And though we differed at times with Howard's conclusions, we could never doubt that he cared deeply about the well-being of the University and the values it seeks to espouse.

Indeed, when we were seeking the right words to express Marquette University's institutional vision and sense of direction, it was Howard Eisenberg who was most responsible for discovering the formulation that we finally settled upon: "Our vision is to provide a Catholic, Jesuit education that is genuinely transformational so that our students graduate not simply better educated but better people, and to do so with such excellence that when asked to name the three or four best Catholic universities in America, people will include Marquette as a matter of course."

In his work as Dean of our Law School, it was precisely that transformational process that Howard sought to achieve in the education of our law students. To his view, he and his colleagues would achieve success when each graduating class left the Law School not only with a high level of legal competence but also that much better as human beings for the experience. And when Rembert Weakland, then the Archbishop of Milwaukee, asked me whether Howard would possibly be suitable to chair a very sensitive committee that would investigate the practices of the Archdiocese with regard to priests who were accused of sexual misconduct, I told him that he would surely find Howard, as a religiously committed person, to be respectful of Catholic belief and practice. At the same time, I noted, Howard would be clear and forthright in stating the committee's findings, would be direct with

criticism if such were needed, and would not mince words in that regard. And so, because the Archbishop was looking for precisely that sort of leader, this became one of the final projects that Howard undertook while still alive. Characteristically, Howard plunged into that project with great dedication, and a few weeks before his death he and his colleagues on the committee produced a very nuanced and careful preliminary report which Archbishop Weakland accepted in its entirety.

Howard's sudden death in June 2002 came as a major shock to all of us. We knew, of course, that we had lost a great dean. But we also recognized that we had lost as well a marvelous and wonderful human being. Howard was committed, forceful, intense; and there can be no doubt that he worked too hard and undertook too many projects. That was, however, who he was, and he probably could not have acted otherwise. At the same time, he was an engaging personality with a scintillating mind and a wonderfully wry sense of humor. Above all, he cared. He cared deeply about the Law School and about legal education, about the achievement of true justice, about all the people with whom he came in contact. Though they be rich or poor, in the mainstream of society or on the margins, whoever they were, he cared. And it is for this above all, for who he was as a human being, that many of us will miss him so much. For our Marquette University community and for so many others his life was a blessing, and for that we are so grateful.

DAVID R. BUCKHOLDT*

My relationship with Howard Eisenberg was pretty much restricted to Marquette administrative business. We rarely saw one another outside of work. We met about once a month on law school issues and interacted on university business in group contexts at least once each week for several years. As academic vice president, I was Howard's boss, but we rarely talked about this aspect of our relationship. While Howard recognized the concept of authority, he never felt comfortable with the concrete reality of having a boss and, except in rare instances, I never thought of myself in that way either when I was working with him. Howard responded well to reason and argument, but any decision based

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on pure authority, status, or position irritated, and sometimes enraged, him. He was incapable of flattery or small talk. Howard was all business all of the time, at least with me, and I liked it that way. I had confidence in his ability to lead the Law School without much help from me, and my judgment was correct. His competence made my job much more tolerable than it otherwise would have been. A poorly run, high-profile school is a terrible headache for an academic vice president.

Howard was abrupt, straightforward, and passionate. I particularly admired his passion. It sometimes boiled over into an emotional outburst, but I found his volatility to be constructive, usually. He scared the hell out of some university administrators and faculty who had never come face to face with passion and indignation in their families or schooling and did not know how to react. Usually they stayed clear of Howard, but they seemed fascinated, at a distance, by the force of his personality. Unfortunately, this fascination sometimes got in the way of their understanding of what Howard was trying to say.

The Marquette University Law School made great progress under Howard's leadership. Recent graduates from the best law schools in the country chose Marquette to begin their teaching careers in large part because Howard was dean. Applications soared and the quality of applicants improved markedly. Alumni renewed contact with the Law School and their contributions increased steadily. A new part-time program brought an older, more diverse group of students to the school. Howard negotiated a new financial arrangement with the University that allowed the school to retain and manage more of the tuition revenue that it generated. This arrangement has enabled the school to improve overall quality and to boost morale. Other deans are now looking for a similar deal so that they can improve quality and reward excellence in their units.

As I mentioned, the quality of the Law School improved markedly under Howard's leadership, but gains did not show up quickly in national rankings, particularly the rankings published by *U.S. News & World Report*. These rankings are notoriously unresponsive to changes in the short run. Howard was not a patient man. He wanted the positive changes that he and his colleagues had engineered to affect rankings immediately; otherwise, he argued, they were little more than outdated measures of stuffy prestige that had little basis in today's reality. Howard was not a person to be content with an analysis of the problem that did not lead to action. He joined with several other law deans who held similar opinions about the rankings and refused to supply data as requested. To date this has caused few, if any, problems,

but it was a risky decision. Howard was always willing to take risks when he thought an important principle was at stake.

Numerous persons at Marquette have commented on their delight and surprise that Howard, a religious Jew, identified so closely with the religious identity and mission of a Catholic, Jesuit university. This reaction seemed strange to Howard given his view that moral and ethical issues and questions are not all that different for persons of differing backgrounds who have a religious ear. Howard appreciated being part of an academic community in which important matters of community life and faith could be openly and honestly discussed. In this Howard was not alone at Marquette. However, he had little company when it came to turning a critical eye on the institution itself. He was never content to deal exclusively with external issues when he felt that there were serious problems in the immediate academic neighborhood. His most pressing concern was that Marquette was not paying a suitable wage to some of its employees. Largely because of his efforts, the University now has a policy that directs the administration to look at its wage rates for the lowest-paid employees each year and to make appropriate upward adjustments when these rates fall below a "living wage" standard. This policy is perhaps Howard's greatest legacy to Marquette outside of what he has done for the Law School.

While Howard was generally all business, on occasion a keen sense of humor showed through the rough exterior. My favorite example occurred several years ago when two deans who had been asked to serve on a high-profile committee inquired of Howard what was in store for them since he had been a member of this particular committee. Howard explained some of the issues dealt with by the committee and then congratulated them on their selection. They beamed, until he added that it was equivalent to winning a "manure-eating contest" (he used earthier language).

Howard loved his job as dean, but he seemed happiest when working as advocate for the oppressed and out-of-luck. He would have made a good community activist or labor organizer. Intolerance and injustice touched the very center of his soul, and he was capable of intense sympathy and anger towards the conditions that some humans endure. His eyes blazed and his concentration narrowed when he came in contact with other than fair play or a level playing field. Howard was a great dean, but I will remember him most not as dean but as an admired colleague who was passionate, honest, and intense in his desire to create a better world for those most in need of help.

MADELINE WAKE^{*}

At the reception following the Marquette University memorial service for Howard B. Eisenberg, ten academic deans wore Chicago Cubs baseball caps. By this unlikely sign of solidarity, respect, and grief, we sought to demonstrate that, despite our diverse worldviews, strategies, and actions, we deans had been a group of shared values and that Howard had been a leader among us. He was the spokesperson for justice, institutional integrity, and mission. He was also a colleague and friend.

Because his fellow deans were peers—we did not report to Howard, and he did not report to us—and colleagues, I wished to capture some aspects of our relationships for this forum. And so I surveyed some of our colleagues. Bob Deahl, Dean of the College of Professional Studies, shares the following:

Howard and I saw each other three or four times a week—almost every week, for six years—at the Marquette University Rec Plex. We would both arrive at our offices at the five o'clock hour to begin our work and then head over to the Rec Plex when it opened at 5:45 for a daily morning workout. It was at the sink while shaving or while putting our cuff links in our French-cuff shirts (we were two of the few who wear French-cuff shirts on a regular basis) that we would share jokes, talk about issues at the University or in the city at large, or just shoot the breeze. Over those many years we discovered that we shared a mutual fondness for Woody Allen movies. We exchanged biographies, articles, and movie reviews related to Woody Allen and his films and commented often about some of our very favorite Woody Allen movies. In many ways, Howard had a Woody Allen sense of humor—a wonderful blend of irony, sarcasm, and deadpan humor.

Others were eager to share their recollections as well. For example, Jack Augustine, Dean of the School of Education, credits Howard with assisting a homeless shelter to meet legal challenges and remain open. Doug Green, Dean of the College of Engineering, recalls the day Howard showed up at a Deans' Council meeting wearing his Cubs cap and shirt (Howard's only comment to those assembled was, "Everyone sings in his own church!"). Doug also reports often seeing Howard at the post office late in the day. He now reflects on the "pen pal"

^{*} The writer is Provost of Marquette University. From 1993 to 2002 she served as Dean of the College of Nursing at the University.

relationships Howard had with those in prison, offering representation, support, and hope.

Howard spoke for and within the University as well. The mission of Marquette holds forth ideals of excellence, faith, leadership, and service. It reads, in part, "Through both our academic and co-curricular programs, Marquette strives to develop men and women who will dedicate their lives to the service of others, actively entering into the struggle for a more just society." Howard was often called upon to represent the mission in public forums. Thus, during the inauguration of Father Robert Wild as President of Marquette in 1995, Howard spoke on characteristics of Catholic higher education.

When the Association of Jesuit Colleges and Universities needed a plenary session speaker for its national conference on "Commitment to Justice," Howard was selected. He issued a call for justice within Jesuit institutions. He began his presentation by saying that who makes decisions was very important to St. Ignatius, founder of the Jesuit order. He said that through decision processes, we are co-creators with God. Howard called for communal discernment to bring about internal justice within Jesuit universities, including with respect to matters of diversity, gender equity, and assurance of a living wage for all employees and for employees of any firms contracted for university work. He further called for transparent decisionmaking. Howard observed, "The lines of authority should be clear and the actual decisionmakers identified. When decisions are made, they should be clearly and publicly stated, with supporting rationale."

Howard represented the deans on the Administrative Committee, the Diversity Task Force, and other entities within the University. His role on the Deans' Council was especially significant. Howard had a high degree of intolerance for injustice and meaningless effort. At times the deans' group would caution him to soften his comments. Yet we depended on his courageous challenges to the status quo. Though an uncompromising proponent of justice, Howard was open to dialogue and consensus-building in the deans' group. When the deans decided to commit shared values to paper as a common core for action—an extension of the University's vision and mission statement—we held a series of meetings. We analyzed and discussed ideas submitted by each individual dean to come up with a product endorsed by all: "Our vision is to provide a Catholic, Jesuit education that transforms our students intellectually, spiritually, and ethically in an environment of learning and scholarship that is committed to their development as leaders for social justice in the world community."

Today Howard's memory is present in the Deans' Council. Often a dean will say, "What would Howard have said here?" His clarity of purpose, commitment to justice, and recognition of the responsibility of academic leadership continue to guide us.

JOHN L. COFFEY*

Howard, as an alumnus of Marquette, I salute you for a job well done. You served Marquette to the pinnacle of human capacity. The University's Law School—and its students and graduates—will from this day forward be the everlasting beneficiaries of your tireless efforts to enrich the school we are proud to call our alma mater, and to move the school toward the goal many of us have always desired and hoped for—an academic institution with a national reputation that teaches and trains future lawyers who are steeped in principles based on the highest standards of legal ethics. At the same time, you modeled the Jesuit ideal of service to your fellow man and of doing everything "for the honor and glory of God."

You accomplished so much in seven short years. You were a very able administrator and dedicated your boundless energy, time, and effort to improving the faculty and facilities with a most successful daily campaign to raise funds to accomplish these goals. At the same time, you were striving to imbue your students with your singular devotion "to do justice, to love mercy, and to walk humbly with God."

I will ever remember you as a lawyer practicing before the United States Court of Appeals for the Seventh Circuit and the Wisconsin Supreme Court as one who was always well prepared and who spoke directly to the issues; one who could answer each and every question presented, forcefully, but not in an overbearing manner; one who was always gracious and humble while representing society's marginalized and the indigent.

Howard, we the alumni and friends of the Marquette University Law School can say no more. I am sure that when you gave your final argument before the greatest Judge of all on June 4, 2002, you received your eternal reward you so richly deserved.

Marquette is a better law school because you walked in these halls.

Thank you.

* The writer is a United States Circuit Judge for the United States Court of Appeals for the Seventh Circuit and an alumnus of the Law School, Class of 1948.

LOUIS J. ANDREW, JR.*

The first time I met Howard Eisenberg was at a Woolsack Society dinner that was held in the Law School. I had never seen him before. My wife and I were attending the dinner, and I believe it was the first Woolsack event I had ever attended. The evening was very pleasant because I was able to reconnect with some people I had not seen for many years. I graduated from the Law School in 1966 (my wife in Speech, also in 1966), but really had not been involved with anything at the Law School since that time.

The highlight of the evening was a talk that Howard gave at the end of the dinner. He had been at the Law School only for a short period of time, but he was very frank with the guests at the dinner as to what he found when he came to Marquette University Law School.

What my wife and I heard, listening to Howard talk that evening, was a man who articulated the vision of St. Ignatius better than any person we had ever come in contact with. We came to find out in the course of his talk that, on top of that, he was a Jew. (He later delivered a speech entitled "What's a Nice Jewish Boy Like Me Doing In a Place Like This?")[†] There was no way you could listen to Howard that evening without being mesmerized and convinced that this was a man we needed at Marquette. He had a very convincing way of explaining the need for a Catholic law school on the campus of a Jesuit university, following the teachings of St. Ignatius.

It was appropriate that Howard talked about fundraising to the Woolsack Society. The Woolsack Society was founded many years ago as an organization that would help fund special projects at the Law School, so it was basically a donor society. This same talk would be given by Howard over his entire tenure as dean in various fashions. The basic themes of the Law School never wavered. The themes were to define the vision by stating the place for a Catholic law school in our society at a Jesuit university and, secondly, to particularly state the fiscal needs that the Law School must meet to carry out that vision. The Law School simply was not raising enough money each year to meet its needs.

* The author has been a practicing lawyer for thirty-six years in Fond du Lac, Wisconsin, and is an alumnus of the Law School, Class of 1966. He is now the Chair of the Board of Advisors of the Law School.

[†] This speech is reproduced as part of this issue. See *infra* p. 336.—ED.

My wife and I went up to speak with Howard after his talk. Basically, I told him that I had some amount of fundraising experience and I would be happy to help him. He asked if he could come up to Fond du Lac and talk to me, and I readily agreed.

Several days later I heard from Howard. He followed through on his promise to come to Fond du Lac to meet with me. We had lunch at my favorite lunch spot in Fond du Lac and talked for about two hours regarding what could be done at the Law School to create some fundraising momentum and to get the fundraising mechanism on track.

Thus began a series of monthly meetings that I had with Howard over the six years of his tenure as dean. Slowly, as the months and years went by, additional dedicated alumni were added to our group. Eventually the group grew to about fifteen people, with a core group of five or six. About a year ago, Howard named this group the Marquette University Law School Board of Advisors, and a charter was adopted setting forth its fundraising and other duties. We would meet almost every month. We started meeting in the first few years at the University Club, and thereafter switched to the Law School. In the last three or four years, all of the meetings were held in the Dean's conference room at the Law School, which was recently renamed the Woolsack Society Conference Room in honor of a gift from the Society. Over this period of time the amount of money that was being raised to help the Law School on an annual basis went from \$200,000 per year to approximately \$2 million in the past year. Even with that, we still were not meeting all of the needs that the Law School has.

It would be hard to overstate how effective a fundraiser Howard really was. He was an extremely effective public speaker. He also was a very warm individual, so when you sat down with him and heard him articulate his vision, it was difficult not to buy into it. I have heard him talk many, many times, and I became more convinced every time I met with him that this was a man whom I wanted to follow.

You can see that I went from really no law school involvement for thirty years to a fairly intense amount of involvement for the last five or six years. It was the most fun fundraising that I have ever had. It made me feel a part of something much bigger than I was, and I guess that's why in the long haul I was willing to spend the time. Just being around Howard made you feel better about yourself. You knew that this man was committed to not only bigger things, but also better things for our world. I just felt when I was in Howard's presence that I was contributing to something that would help make the world better. Politically, Howard and I were poles apart, but I believed in this man.

He was a good, decent man who was brilliant and had skills that God had given him that he used to the "nth" degree. It was hard for me to understand that he would spend his spare time—and you could say that this was his hobby—representing people with life sentences or on death row. I had never met anyone like that before and probably will never meet anybody like that again. My law office has done a lot of pro bono work over a period of time, but nothing compared to this. This was really opening my eyes.

We all talk about what contribution one person can make in his lifetime to the betterment of the world. This is one of the few people I have ever met who really showed how this can be done. The interesting thing is that Howard seldom talked about what he did. What I learned about his work I usually learned from others, or I learned it as part of his communication of his vision for the Law School and for lawyers in general.

To get back to how we increased the amount of funds that were raised annually at the Law School, I have to be fair and say that it was not only Howard that worked on this, although Howard was the leader and without him this would have been extremely difficult. Christine Wilczynski-Vogel, Assistant Dean for External Affairs, and later Jason Kraiss as well were instrumental in doing all of the backroom work to create the organization that would allow Howard to use his time very efficiently. What ultimately turned out to be the Board of Advisors of the Law School was a very dedicated group of alumni, who as I stated met on a monthly basis. The attendance has been surprising over the years. The dedication of the core group of people on that board has been truly astounding. All of these people are devoted to Howard.

On top of all of these hard-driving traits that Howard exhibited in fundraising, teaching, and carrying out all of his pro bono work, Howard still had a great sense of humor. He was pleasant to be around. Howard was very warm in a shy sort of way, but he was very convincing when he got to his core message.

I can remember a breakfast at the University Club about a year or so ago when Howard, Christine, and I were intending to convince a very prominent, retired insurance executive to join us in helping to raise some million-dollar contributions. This was a very daunting task for all of us. We thought this gentleman could help. He was very friendly throughout the whole conversation, but my feeling was that he came into the breakfast thinking, "I will be courteous and listen to these people, but I really have too much to do in my life." He left the meeting, as many others did after meeting with Howard, convinced that

this man was making a difference and committing himself to helping us in this daunting task. It is daunting because the Law School has never received a million-dollar contribution. In fact, to this date, the largest contribution that the Law School has received was a very generous \$500,000 contribution. But, in order for the Law School to move forward and meet all of its needs, it has to start raising a number of million-dollar contributions or it will not accomplish its goals. This was just another of a series of meetings that Howard had with alumni and other interested persons, using his magic to convince people that his vision was the correct vision for the Law School.

Many other alumni were asked to attend lunches, dinners, breakfasts, or any other forum that could be used for this purpose. Howard didn't care where you lived—he would travel to the West Coast, the East Coast, the South, the North, and he even went to Europe on one occasion, trying to convince alumni of the Law School to buy into his vision and to assist him in gathering the resources to execute the vision. In this day and age, there is no way for a law school to be effective as a private institution without its dean's being very involved in fundraising. I'm not sure every dean of a private school understands that, but Howard understood it, and in my estimation used about half of the energy that he had for that purpose. He was fundraising all the time. At one of our early meetings we talked about trying to create at the Law School a "culture of philanthropy." He liked that. He thought that this was exactly what was necessary to carry out our vision. He proceeded to implement that concept with all of his meetings and trips and breakfasts and dinners, which I am sure were a big sacrifice for his family, but it was his way of carrying out and doing the things that he felt were necessary to make Marquette Law School successful.

What I will miss about Howard are the monthly meetings that I had with him and the e-mails I received. The meetings usually lasted about an hour and a half, but it was an hour and a half's worth of very fruitful discussion, where we would hear about lots of things in addition to the Law School. I learned about the Chicago Cubs, I learned about Judaism, I learned about dedication and giving, I learned about Phyllis and his family, I learned about what it takes to make a law school tick, I learned about warmth and humor, I learned about success without bragging, I learned about St. Ignatius, I learned about the dedication of Father Wild, I learned about university politics, I learned about wonderful students, I learned about clear, passionate writing, I learned

about leadership, I learned about goodness, and I learned what *pro bono* really means.

For me, Howard will always be one of the best people I have ever met in my life. He will be an example to me of what one person can do in the world. He will be a person I will remember when I think about the teachings of St. Ignatius. When I think about the phrase that when working in charitable work you get back more than you put in, I will think about working with Howard.

Howard has left his indelible imprint on the Law School. It is now our job to carry out his vision and to create and execute the vision of the future.

JAMES F. JANZ*

My all-too-brief relationship with Howard Eisenberg began at a luncheon not long after he became the Dean of Marquette University Law School. The luncheon had been organized by one of my classmates for the purpose of introducing "the new Dean" to several law school alums and discussing fundraising. Although I cannot recall exactly what Howard said at that luncheon, I now realize that I left the room an "Eisenberg disciple" with a new enthusiasm for both the legal profession and more particularly the future of Marquette University Law School.

Others may write with more authority of Howard's accomplishments as a scholar, professor, administrator, and practitioner, but my most treasured recollections are of his character, unwavering dedication to justice, and clear vision of the "Marquette difference." Between December of 1998 and October of 2000, Howard gave a speech entitled "What's a Nice Jewish Boy Like Me Doing in a Place Like This?"[†] and wrote a series of four "letters to alumni" describing his "vision" for Marquette Law School. These documents not only provide insights into the character of this truly spiritual and compassionate man but also clearly describe Howard's perception of the unique "value-based" legal education he was determined to provide at Marquette.

Because Howard lived a life of "service to others," he was a very credible and inspirational leader and role model for law students and

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[†] This speech is reproduced as part of this issue. See *infra* p. 336.—ED.

faculty as well as practicing attorneys. Although Jewish, Howard clearly embraced the philosophy of St. Ignatius of Loyola through his commitment to provide excellence in education for the purpose of preparing Marquette graduates dedicated to justice, ethics, morality, and service. As a highly regarded legal scholar and successful practitioner, he also clearly understood the importance of a curriculum which rigorously teaches the theory of law as well as the practical knowledge required to apply "theory" to successfully resolve legal problems. More simply put, it was Howard's commitment to graduate students who were both competent lawyers and better people.

Like most of us, Howard did not relish the idea of devoting a significant portion of his time and effort to the task of fundraising. It would have been much easier, and certainly understandable, if he had delegated that responsibility to "professional fundraisers," while restricting his involvement to appearances at a limited number of fundraising functions. However, it was simply not Howard's nature to "wait for someone else" to get this critical job done. Howard was a "practical visionary" in that he recognized that his dreams for the future of Marquette Law School required a significant increase in financial resources. Through his tireless efforts and enthusiastic dedication to his vision, funds donated to Marquette University Law School have reached record levels in each of the last two years.

Over the past few years a classmate and I asked Howard to meet with us on several occasions to simply talk about life in general, hoping to provide an opportunity for him to discuss any personal concerns regarding his position at Marquette. While we always discussed the challenges of his role as dean, it was at these meetings that we gained a deeper understanding of Howard's intense dedication to family, religion, pro bono work, teaching, community activities, and scholarship. All of these were very important to Howard, and his greatest concern was that he would simply not have the time or ability to do justice to each and every one. At our most recent meeting, he commented, "One of these days I'll simply have to determine what I want to be when I grow up." His selflessness and humility were evidenced by his consistent response that he did not require higher compensation, improved benefits, or additional recognition but rather was simply looking for a way to find enough time to accomplish all of his goals.

For me, the name Howard Eisenberg will always be synonymous with compassion, leadership, ethics, justice, service, hard work, humility, and, most importantly, spirituality. Because of Howard's example we should all be motivated to follow his directive to "do well and do good."

We will forever be grateful that this "nice Jewish boy" wound up at Marquette.

MICHAEL H. GILICK*

I first came in contact with Dean Eisenberg in connection with the twenty-fifth reunion of my law school class, the graduating class of 1973.

Law school was not remembered fondly by the students of my time. The teaching philosophy had been rather harsh, given to large quantities of intimidation and personal challenge bordering on insult. No doubt the professors were well-intentioned, meaning to ready us for the rigors and pressures that are endemic to the practice of law. Nevertheless, the inevitable side effect of such an approach was a lack of sentiment for, and even an active ill will against, the institution. We made little effort to keep in contact with the school, and whatever efforts the school made to maintain a connection with us were not well received.

By the time our twenty-fifth reunion was approaching, however, rumors were in the air that the atmosphere had changed at the Law School, and that the new dean was of an entirely different era and approach. That—and the fact that twenty-five is an understandable milestone—brought several of us to a meeting called by the Dean's assistant to organize the event. The Dean attended, and, within the space of a few minutes, he disarmed us all. He was clearly aware of the lack of enthusiasm that some alumni had for the school, and what surprised us was his genuine concern and dismay about our attitudes. He immediately turned the planning session into a group discussion. The details are unimportant, but what I remember was his openness and willingness, or rather ardor, to replace our lack of interest with his own commitment to the school. He made us feel, perhaps for the first time, that it was our school, that it was (as it actually had been all along) an important part of our profession and our community. What started as a reunion committee quickly became a support group, a mechanism to bring us into the life of the school, to give us a role in the school's contributions to the community.

How did Dean Eisenberg effect such a drastic change in us all in such a short period of time? In a word, he was open. There was little of pretense or politics in him. We knew in very short order that he meant what he said. His feelings were genuine and obvious. He impressed us

* The writer is a lawyer in Milwaukee and an alumnus of the Law School, Class of 1973.

all precisely because he made no effort to impress us. In both appearance and in speech, he was plain, straightforward. There was an aura of honesty about him, a lack of pretense that took you in more profoundly than any pretense ever could. He was concerned about the subject at hand, not about his power or position. He wasn't seeking accolades or personal reward. He was calling on us, not for himself, but for a cause that should be common to us all.

Somewhere during that first meeting, he made us two promises that, as far as I know, remained true until his untimely death. The first was that if we had a project that called for his participation, he would take part if he possibly could. The second was that his door was always open. We have all made that second promise in some form or another, usually in the same manner in which we tell passing acquaintances that we should do lunch. The Dean, on the other hand, was not only accessible through his secretary. He literally opened the private entrance directly to his office, and for good measure he put a welcome mat in front of the door. When that door was open—and I never found it closed unless he was not there—he gave you his attention promptly and fully.

I asked for his participation in projects on several occasions, and, apart from one time when he was to be out of town, he joined in enthusiastically each time. One occasion stands out. The University arranged a week-long celebration of the life and death of Joan of Arc. The celebration included lectures and plays and various other events. One of the events involved a debate based upon St. Joan's rebellious attitude toward the institutional church. Joseph Perry, then a priest in the Milwaukee Archdiocese and a noted scholar of canon law (and now an auxiliary bishop in the Chicago Archdiocese), took the side of the authority of the Church, and I was asked to argue for the voice of rebellion within the Church. Dean Eisenberg agreed to moderate the debate.

The three of us held several preparatory meetings, and the Dean began our first meeting with a disclaimer that, since his religious upbringing and commitment were Judaism, he knew very little about the workings of the Catholic Church, but that he would make whatever observations and suggestions he could. Bishop Perry and I discussed the matter for some time. During that time, the Dean remained silent. Then he made two suggestions, both of which became the focal points of the actual debate. What he had done was, first of all, truly listen, and, second of all, go directly to the heart of the matter.

Someone once said that a philosopher is an expert in revealing the obvious, and someone else said that a great insight is one that elicits the response, "Of course. Why didn't I think of that?" The Dean's observations, both in our preparatory meetings and in the debate itself, all fell into that category. The questions he asked us after our prepared remarks remain in my memory to this day, and the issues he raised have forced me to examine my Christian faith far more deeply than I had before.[†]

One of the most telling events which revealed the community's respect and admiration for the Dean's wisdom was his appointment by the Milwaukee Archdiocese to head the investigation into sexual misconduct on the part of the clergy. We will never know how much he would have done to heal the gaping wounds left by these scandals. We are all sure, however, that he would have, as he did in all his dealings, gone fearlessly, and lovingly, to the heart of the matter, and that he would have caused us all to rise above our own isolated pains and concerns and work for the betterment of the whole community.

Eulogies have an odd and telling characteristic. When we praise people at their passing, we seem to, in effect, list all the things that we see as really valuable, really meaningful and worthwhile. We praise, not the accumulation of wealth or power, but rather the use of that wealth or power to serve the needs and betterment of others. Sometimes this means that some editing has to be done, so much so that we have to ask on occasion whether the eulogist was talking about the person we knew.

In Dean Eisenberg's case, no editing is necessary. He spent no discernible effort at gathering either wealth or power. The power he had he used for us. His legacy is one, not of personal achievement or aggrandizement, but rather of having left the people and institutions that he touched better for his having touched them. The greatest praise that we could give him, the praise that he would no doubt ask for, would be to carry on his work and his spirit, to commit ourselves to others with the same depth and vigor that he committed himself to us.

[†] A transcript of the debate was published in *JOAN OF ARC AT THE UNIVERSITY* 74-92 (Mary Beth Tallon ed., 1997).—ED.

TOMMY G. THOMPSON*

Among the best things about being Governor of Wisconsin were the people I had the opportunity and privilege to meet. And among the outstanding people I met was the late Dean Howard Eisenberg.

I did not know Howard as well as some—but from my experiences with him, and from my observations from afar of his career and accomplishments, I will always be envious of those who did. He was a man of graciousness, integrity, and profound intelligence.

When you hold public office, you are often surrounded by bright and well-educated men and women who offer knowledge and counsel. Howard was both of these things, of course, but he was also wise.

Let me recount one of my memories of Howard. I was so proud of my daughter Kelli when she decided to attend Marquette University Law School. Marquette is a great school. While it is true that I am a proud University of Wisconsin Law School graduate, I cannot help but be impressed by the innumerable contributions that Marquette has made to the legal system of Wisconsin. It is truly a powerhouse of legal education.

Upon Kelli's graduation in 1996, I was invited to give the commencement address—for both the Law School and the University. It was a signal honor, and naturally I wanted to do the best I could for my daughter and the school that had been so good to her.

Howard Eisenberg received us with warmth and grace. He treated us with a courtesy exceptional for a man of his position, going out of his way to make us comfortable and—most extraordinarily—doing his utmost to ensure an enthusiastic reception from the students and faculty of Marquette. I gave my speeches and watched Kelli receive her degree. As we left Milwaukee the next day, I thought to myself how lucky Marquette Law School was to have such a fine person as its dean.

Howard treated us so well, not merely out of kindness, but also out of a supreme confidence in his own thought and philosophy. It is important to remember this when considering Howard's career: he was not angry or ideological. He demonstrated that confrontation need not be a component of conviction. His powerful intellect gave rise not to arrogance but to a sense of humility. So, even when he disagreed with people politically—like, for example, a conservative governor—he was agreeable personally.

* The writer is Secretary of the United States Department of Health and Human Services. From 1987 to 2001 he was Governor of the State of Wisconsin.

This quality enabled Howard to stimulate and encourage robust, scholarly debate at the Marquette Law School. He bestowed a passion for the profession of law upon his students, and Wisconsin is a richer state for it.

Howard Eisenberg was a good man. He loved truth and excellence more than ideological advantage. He was the very model of an American intellectual.

As someone once said upon the death of a friend, "Winter came too soon." Winter has come too soon with the passing of Dean Howard Eisenberg. Too soon for his family. Too soon for Marquette. Too soon for Milwaukee. Too soon for Wisconsin.

Howard's legacy cannot be fully captured in a valedictory essay or soon-ignored memorial plaque. It is in the sharpened minds of countless attorneys, in the justice system that he did so much to strengthen, and in the lives of the many who have benefited from his sage advice and sterling example. He has gone too soon, but his legacy will endure.

DIANE S. SYKES*

Howard Eisenberg was blessed with high intelligence and a big heart, and he put both into the constant and steadfast service of others. He touched so many lives—as a brilliant legal scholar, teacher, and dean; as a dedicated lawyer to the dispossessed and disfavored; and as a spirited friend and advisor to many, at Marquette University Law School, in the justice system, and in the community. I was among those privileged to observe Howard's work firsthand—from my vantage point as a member of Wisconsin's judiciary and an alumnus of the Law School—and also to know him as a friend.

Howard left his mark on state and federal criminal and habeas law, arguing more than 300 cases in the appellate courts, and participating as *amicus curiae* in many more.¹ But Howard's most remarkable

* The writer is a Justice of the Wisconsin Supreme Court and an alumnus of the Law School, Class of 1984.

1. A sampler: *Granberry v. Greer*, 481 U.S. 129 (1987) (establishing a case-by-case "interests of justice" standard for consideration of state's failure to raise non-exhaustion of state remedies in a federal habeas proceeding); *Holloway v. Arkansas*, 435 U.S. 475 (1978) (holding unconstitutional, under the Sixth Amendment, trial court's failure to appoint separate counsel or ascertain probable risk of conflict of interest in joint representation of co-defendants); *State ex rel. Deisinger v. Treffert*, 85 Wis. 2d 257, 270 N.W.2d 402 (1978) (holding that due process requires release from confinement upon expiration of maximum potential sentence for criminal offense of defendant found incompetent to stand trial and

contribution as an appellate lawyer was his willingness to apply his considerable legal talent to so many cases that would not likely result in a major development in the law, on behalf of hardened, troubled, sometimes defiant prison inmates, and to do this tirelessly and pro bono. The patience, understanding, wit, and wisdom he brought to this work will be much missed and long remembered.

Howard left his mark on Marquette Law School. Although perhaps counterintuitive on the surface, his appointment as dean was a perfect fit. He was the first non-Catholic to serve in that position, and the first Jewish dean of any of the University's colleges. Yet he embraced and embodied the Jesuit educational mission, particularly the emphasis on *cura personalis*, care for the whole person, and especially as that value is incorporated into the practice of law and into legal education.

Howard worried about the clash between the values of Ignatian spirituality and the prevailing "real world" cynicism of the legal profession and the legal academy. He sought to establish an environment at the Law School that would harmonize the aspirations of a spiritual life with the realities of a sometimes-dispiriting secular legal world. He challenged his students to become "good and moral citizens" as well as good lawyers.² Through his own prolific work in the community, he provided a vibrant example of how to achieve a balance between "doing good" and "doing well" in the legal profession, inspiring hundreds of law students and lawyers to do the same.

In a speech to the Harvard Law School Association on the occasion of Harvard University's 250th anniversary, Oliver Wendell Holmes, Jr. made this observation about the role of lawyers in society, and about the

committed for observation and treatment); *Will v. State*, 84 Wis. 2d 397, 267 N.W.2d 357 (1978) (establishing procedures for trial court's determination of indigent defendant's ability to pay a fine); *Hugget v. State*, 83 Wis. 2d 790, 266 N.W.2d 403 (1978) (establishing procedures for trial court's determination of indigent probationer's ability to pay restitution as a condition of probation); *Reichhoff v. State*, 76 Wis. 2d 375, 251 N.W.2d 470 (1977) (holding unconstitutional the prosecutorial use of evidence of defendant's silence at time of arrest); *Ferris v. State ex rel. Maass*, 75 Wis. 2d 542, 249 N.W.2d 789 (1977) (holding that indigent defendant is entitled to court-appointed counsel at public expense when state agency seeks to enforce its orders through imprisonment for contempt); *State ex rel. Tyznik v. Department of Health & Social Servs.*, 71 Wis. 2d 169, 238 N.W.2d 66 (1976) (requiring development of standards and criteria for parole board's decision to grant or defer discretionary parole); *Myers v. State*, 60 Wis. 2d 248, 208 N.W.2d 311 (1973) (holding that defendant has due process right to impeach witnesses with prior inconsistent statements made during otherwise secret John Doe proceeding).

2. Howard B. Eisenberg, *What's a Nice Jewish Boy Like Me Doing in a Place Like This?* [This speech is reproduced as part of this issue. See *infra* p. 336 (quoted material at p. 344).—ED.]

mission of a law school:

Lawyers . . . were among the first specialists to be needed and to appear in America. And I believe it would be hard to exaggerate the goodness of their influence in favor of sane and orderly thinking. But lawyers feel the spirit of the times like other people. They, like others, are forever trying to discover cheap and agreeable substitutes for real things. I fear that the bar has done its full share to exalt that most hateful of American words and ideals, "smartness," as against dignity of moral feeling and profundity of knowledge. It is from within the bar, not from outside, that I have heard the new gospel that learning is out of date, and that the man for the times is no longer the thinker and the scholar, but the smart man, unencumbered with other artillery than the latest edition of the Digest and the latest revision of the Statutes.

The aim of a law school should be . . . not to make men smart, but to make them wise in their calling . . .³

That was 1886. But the responsibility of a law school to convey to its students the distinction between the mere acquisition of knowledge, and the nobler search for wisdom, is even more important today. Howard Eisenberg knew this; he preached it; and he lived it. He applied the expansiveness of both his mind and his heart to the myriad problems he undertook to solve. He was not just knowledgeable in his many callings; he was wise. The Law School, the University, the community as a whole, and many individual lives are better for having been the beneficiaries of his wisdom.

HOWARD B. EISENBERG (1996)*

It is my great honor and pleasure to join you this evening at the annual Brotherhood/Sisterhood Banquet. I know firsthand the work of the National Conference and how important it is in bringing people together to achieve understanding, harmony, consensus, and true

3. Oliver Wendell Holmes, Jr., *The Use of Law Schools*, Oration Before the Harvard Law School Association on the 250th Anniversary of Harvard University (Nov. 5, 1886), in *THE ESSENTIAL HOLMES: SELECTIONS FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR.*, 224, 226 (Richard A. Posner ed., 1992).

* These remarks were delivered at the February 18, 1996 Manitowoc County Brotherhood/Sisterhood Banquet and were entitled "Brotherhood, Anger, and the 1996 Election."

brotherhood and sisterhood. Today there are too few people and organizations committed to promoting peace and understanding. In this climate, the work of the National Conference is all the more important, and I am delighted to be part of this annual event.

Like many in this room, I still think of the National Conference as NCCJ, the National Conference of Christians and Jews. Certainly, brotherhood is a primary precept of the Judaeo-Christian heritage that comes down to us from the earliest pages of Genesis. As American society has changed, we have recognized that not all people of goodwill are Christians or Jews. Some are Moslems, Buddhists, or members of Native American religious groups. Others do not profess a religious belief. The change in the name of the Conference recognized that brotherhood is an inclusive, not exclusive, concept. We welcome every person of goodwill at the table who is willing to work for peace, harmony, and understanding. There is no time in American history when such a goal was more important, or more in jeopardy.

I want to devote my remarks to some observations about how the concept of "brotherhood" has changed over the last thirty or forty years, and why the concept continues to be relevant today. I want to reflect on "Brotherhood, Anger, and the 1996 Election."

I must say that it gives me some hope to see this many people publicly admit they support brotherhood and sisterhood, because in some quarters the notion of brotherhood has become politically incorrect and anachronistic. Thirty years ago many of us marched in the streets, supported political candidates, and advocated for brotherhood. We joined hands and sang "We Shall Overcome" and talked about "black and white together." We agreed passionately with Dr. King when he urged us to judge people by the "content of their character" and not by the color of their skin. To be honest, in many ways we have made little progress in the twenty-eight years since Dr. King's death or the more than forty years since *Brown v. Board of Education*. Something unanticipated has happened in this country, something sinister, something dramatically inconsistent with the notion of "brotherhood." The bigotry and intolerance of the first half of this century has been replaced by a meanspiritedness and anger of the last forty years. People don't talk about "brotherhood" any more, they talk about "power." We don't talk about understanding and harmony, we talk about "sound bites" and market share. Compassion has been replaced by selfishness. People who a generation ago wore robes and hoods and burned crosses now wear business suits and call themselves "consultants."

If you don't understand what I mean, I invite you to turn on talk radio or any of the numerous television talk shows. These programs seethe with anger, hate, and venom. Often the very premise of such programming seems to be creating ill will, misunderstanding, and contention for its own sake. Twenty years ago in Paddy Chayefsky's satire about network television, TV newsman Howard Beale told his viewers to open their windows and scream, "I'm mad as hell and I'm not going to take it any more." Chayefsky imagined a new television network which thrived on a mixture of sensational "video verité" and crude humor. Chayefsky was obviously prescient. If anything, he understated what would happen. If you are "lucky" today, you can see family members have a fistfight on television, and you can hear radio commentators and listeners denounce in the crudest and most simple-minded terms every political leader, every sports owner and athlete, and anyone else whose name has come to the attention of the speaker. Often these diatribes have no relationship to fact or are taken so completely out of context as to be devoid of meaning.

If you still need convincing, listen to the presidential candidates, if you can stomach it. The level of political discourse in this country has reached a new low, and it wasn't very high to begin with. The people behind political candidates—if not the candidates themselves—frequently come from curious backgrounds that include extremist groups, fringe political organizations, and groups devoted to dividing the races, classes, and people of goodwill. The clever—and often malicious—turn of phrase has replaced any semblance of substantive discussion. Today candidates actually *intend* to create a wedge between segments of our society in a way never contemplated by Strom Thurmond or George Wallace. The "in your face" style of politics and journalism has more often than not replaced any reasoned discussion of the pressing issues of our day. For example, a candidate for the Wisconsin Supreme Court recently called the seven members of the State's highest court "murderers" because they reversed a criminal case. Is there anyone who believes that this type of comment helps anyone, anywhere, understand the issues in the present supreme court race? Yet, this is the type of thing we are subjected to every day.

There is ample room for disagreement between Democrats and Republicans and between conservatives and liberals, but the nature of the discussion is such that it is difficult to even understand the issues, much less understand the differences between candidates or parties. There is no place for race-baiting by anyone. Name-calling, dirty tricks, and negative campaigning violate the most basic values of our society.

Such conduct is inconsistent with the core teachings of the Old and New Testaments. Yet today people who want to be President of the United States, justices on the state supreme court, or mayors of our cities are using these techniques in an effort to attract our support. What is most discouraging is that some in the electorate apparently base their votes on such campaigning.

Then we have the legal profession. I love the law. I love lawyers, and I passionately believe that much of what is good in this country is the direct result of there being fearless members of the bar willing to represent clients of all types. Yet I despair that some members of my profession have forgotten their obligation to be peacemakers and helpers, in favor of conduct that sometimes borders on bullying. By its very nature the legal profession must push the envelope, pursue new theories, and zealously represent our clients. However, lawyers are now competing with the talk show hosts and television preachers for airtime. At one time lawyers represented clients one at a time and one case at a time. Now we see lawyers without clients and without cases who get on the "stir-them-up" bandwagon, trying to gain notoriety by putting down one group of people while acting as protector for another group.

It is the moral and ethical duty of a lawyer to resolve disputes, not to create disputes. I am afraid that some members of my profession have forgotten this basic obligation. We are moving toward the situation in our society that every time something bad happens to someone we immediately look for someone else to blame and sue. Individual responsibility and caring about our brothers and sisters have taken a backseat to pointing the finger of blame, to litigation, and to denunciation.

There is nothing more central to the Christian tradition than love for our fellow men and women. In the Sermon on the Mount, Jesus outlines the basic tenets of Christianity. He spells out the true meaning of brotherhood in a way that few people today seem to believe. He reminds us that peacemakers, the merciful, the hungry, and the persecuted are to be blessed, while those who are angry, contentious, and engage in name-calling will be held in judgment. Regardless of your religious or philosophical background, the Sermon on the Mount remains the basic blueprint for the true meaning of "brotherhood." Yet, isn't it strange how many people who profess religiosity seem to have strayed so far from Jesus's message? The message we all too often hear from clergy people of every variety is a political message of seizing power, of being superior to somebody else, and of condemning those who disagree politically with the prevailing view.

These factors lead me to conclude that if we are genuinely concerned about brotherhood and sisterhood, we must develop mechanisms for achieving harmony, for building consensus, and for overcoming anger. Certainly, many of the programs developed by the National Conference have been models for a meaningful exchange of views by people of widely differing philosophies. White anger and black rage—two terms we hear a lot these days—are not consistent with brotherhood. But they do exist, and they must be addressed by those of us who care about peace and harmony and love in our society.

To be honest, negative campaigning, exposé journalism, and confrontational "entertainment" must have an audience. Everyone seems to decry these tactics, but they continue. The very candidates, clergy people, and journalists who most espouse "decency" seem to be in the forefront of trashing and bashing. Brotherhood is not achieved by condemning those with whom we disagree as being immoral, or worse.

You are the leaders in this community; what you do and say does make a difference. The time has come simply to declare that making yourself seem important by making someone else seem small is inconsistent with our obligations as people of faith and as people who care about our fellow person. We can talk about welfare reform, criminal justice issues, and taxation without denouncing and dehumanizing people who receive welfare, people involved in the criminal justice process, or people who claim the benefits of existing tax law. We must demand more of our elected leaders and candidates for elected office than sound bites and glib retorts, and we must challenge those who avoid the merits of important issues by regressing into jingoism. We can believe in the teachings of the Koran, the Gospel, or the Torah without denouncing those who gain faith elsewhere.

We need to place on the table difficult social and political issues—discuss them rationally, in good faith, make the best decisions we can, and move forward as a society. That task is made all but impossible when the dialogue has been preceded by name-calling, appeals to bigotry, and concerted efforts to obscure the facts. In many ways in America today, more than in 1965, we must decide whether the problems of society will be addressed and resolved by all people, or only by those who are able to assume temporary power on an election-by-election, issue-by-issue basis. Politics of exclusion, rage, and anger cannot possibly benefit this country—certainly not in the long run, and probably not in the short run either.

Many of the people in this room have leadership positions in churches and synagogues, are active in political organizations, and are

involved in social, fraternal, and business organizations. Brotherhood and sisterhood must start with us. It will not happen if *we* are not committed. I do not minimize the stress and pressures that are everywhere in our society, nor do I condemn the frustration felt by many segments of American society today. The problems are daunting and difficult, and the efforts at achieving change have often been unsuccessful. The changes in American society over the past forty years have been breathtaking and extraordinary. A pattern of life that existed in the United States throughout our history has been changed in many fundamental ways. Societal relationships, societal norms, centers of wealth and capital, technology, and political power have been altered in ways not imaginable in 1965. These changes in society have threatened and frightened many people, and we should not minimize or condemn those fears and concerns.

It was much "easier" when brotherhood meant allowing blacks and whites to sit together on buses and eat at the same lunch counter. It was easier for people of goodwill to condemn the desecration of synagogues in the 1950s and '60s than it is to resolve issues of affirmative action today. Today brotherhood and sisterhood are more complex concepts, involving new societal relationships, and a new reality.

We cannot cure all the ills of American society, but we can start. And I challenge you today to commit yourself to work for brotherhood and sisterhood by challenging those who purvey anger, hatred, and contentiousness in our society. We can be advocates, without damning our advocacy; we can hold beliefs, without denigrating the beliefs of others; and we can change society, without doing so on the backs of those who disagree with us. We must reflect those principles in the voting booth, in our churches, in our businesses, and in our everyday relationships. If we do that we will have taken a large step towards achieving brotherhood, sisterhood, love, and understanding.

Thank you.

RODNEY L. BOYKO*

In December 1998 Howard Eisenberg was appointed to represent me before the Seventh Circuit Court of Appeals in a habeas corpus action, challenging an Indiana criminal conviction. Thus began a professional relationship that has humbled and inspired me.

* The writer lives in Indiana.

Right away I knew that Howard was a first-rate attorney, quite apart from his pages of qualifications. He responded to my letters quickly, answering all my questions. Though I was an indigent litigant, Howard never let that affect his representation of me. He made me feel like I was his only client and that he would put all of his time and resources to work for me. Until Howard became my attorney, I thought that attorneys like him existed only in the realm of textbook models, and certainly not within the realm of my case.

Howard was truly an ethical attorney, but he was also a brilliant tactician. He represented me twice before the court of appeals, and both times the court ruled in our favor. During briefing he mercilessly tore to pieces what opposing counsel had put forth as argument but what Howard demonstrated to be snippets of illogical statements. I was thankful he was on my side. His style demanded attention—his words had a way of jumping out at the intended audience with a striking clarity. He was nothing short of genius when getting to the heart of an issue and putting it before the court. I couldn't believe that I had such a talented attorney working for me by court appointment. I especially could not believe that he was willing to let me play devil's advocate—me, an indigent inmate with no formal training in the law, contemplating complex legal issues with a top-notch, veteran attorney. Howard saw nothing debasing about this; his pride was not hurt. He was a perfect blend of teacher-advocate.

In January of 2002, when he had been my attorney for over three years, I finally got to meet Howard in person. He traveled from Milwaukee to near Indianapolis to take my deposition. When we met I could not help but think I was in the presence of greatness. I remember the day well. Howard was wearing khaki pants and a navy blue blazer over a maroon turtleneck with his half wire frame glasses and sportswatch. We probably could have gotten by without the deposition, but Howard was not about to cut corners.

We had a third-party deposition scheduled for June 10th of this year, and in May I sent a few letters to Howard. When I did not get a quick response to any of my letters, I remarked to a friend that it was odd for Howard not to respond quickly. He was always punctual, often filing responses to opposing counsel's motions on the same day as he received them.

On June 5th I learned about Howard's death. I was saddened and, admittedly, quite concerned about losing my attorney. But Howard's light shone just as bright in his last days. While on what turned out to be his deathbed, he made arrangements for another attorney to do the

scheduled deposition and ultimately take over my case. I am deeply humbled that an attorney of his caliber would think of me in his state of health, but this was just the type of selfless person Howard was. The legal community has lost a brilliant mind and defendants everywhere have lost a true advocate.

KENNETH B. DAVIS, JR.*

Compared to most of the contributors to this memorial issue, I feel shortchanged. I didn't get to know Howard until relatively late in our professional lives. He was already well into his deanship at Marquette when I was appointed Dean of the UW Law School in 1997.

Our two schools enjoy a special relationship. I can think of no other state as populous as Wisconsin that has only two law schools. We are responsible for training the overwhelming majority of the State's lawyers and, given the diploma privilege, controlling their admission to the bar. In a state with a strong, unified bar and a long tradition of open government, we are often called upon to share our expertise on the important issues facing the legal profession and the legal system. One consequence is that Howard and I were often asked to serve together on a variety of committees, commissions, working groups, and the like. The Multidisciplinary Practice Commission, the Federal Nominating Commission for United States District Judges and United States Attorneys, the Committee on Multijurisdictional Practice, and the Governor's Task Force on Ethics of Government Employees are examples from the last twelve months alone. Often we were the co-chairs.

My impression was that Howard was a man constitutionally unable to turn his back on a civic or professional obligation. And I was among the many beneficiaries. I knew that no matter how sensitive or daunting the task facing the particular committee or task force, Howard would be there to help see the job through. He embodied wise, quiet, but firm leadership. One could not spend time with Howard without sensing his unwavering commitment to fairness and justice and his basic humaneness, and it served as a model for all who served with him.

He was also, I must add, a tough act to follow, much less share the

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stage with. After one too many occasions on which by the time I read a piece of e-mail, Howard had already responded to it, I joked that someone needs to slow him down. I had no idea how prophetic that sentiment might have been. Armchair medical diagnosis is often annoying. Like many others, though, I cannot help but believe that Howard's unflagging willingness to take on a disproportionate share of the legal profession's workload led to his untimely passing.

I prefer to end with a more halcyon memory of Howard. It was one of those moments that didn't seem like much at the time, but still brings a smile. Last year, the editors of the *Wisconsin Lawyer* decided to devote two issues of the magazine to legal education in Wisconsin. They were eager to have a picture of Howard and me for the cover, but scheduling a common time and place for the photo shoot proved difficult. Finally, we settled on Lake Geneva, where the State Bar of Wisconsin was holding its convention. It was not the most customary setting for such a photograph—a hill overlooking a pond shaped like a giant rabbit's head—a throwback to the resort's original status as a Playboy Club. Howard and I posed, and as the first roll of film turned into the second, we tried to cooperate with the various requests to adjust our ties, our collars, our glasses, our hair, and the rest. A second roll of film was consumed. We fidgeted, chuckled, and exchanged war stories. The photographer kept shooting. It took at least four rolls of film to produce a satisfactory picture of the two of us, and maybe five or six rolls. But it gave us an unexpected opportunity, on a delightful spring afternoon, to relax together. The result graces the June 2001 cover of the magazine. My first instinct when I learned of Howard's death was to track down a copy of that issue. I'm having the cover framed to hang on my office wall, and I'll smile and think of Howard whenever I look at it.

My colleagues and I at the UW have watched and marveled at all that Howard has accomplished at Marquette—the exciting new faculty, the important new programs. We are proud of him as an alumnus, a colleague, and most importantly as a friend. He has put his stamp on the school and on the practice of law in Wisconsin, and we are all better off as a result.

What's a Nice Jewish Boy Like Me Doing in a Place Like This?

HOWARD B. EISENBERG (1999)*

Twenty-five years ago if you had asked me whether it was more likely that in 1999 I would be managing the Chicago Cubs, sitting on the United States Supreme Court, or serving as Dean of the Marquette University Law School, I would have said without hesitation that although the chances of my managing the Cubs or being on the Supreme Court were pretty remote, there was absolutely no possibility that I would ever be the dean at Marquette. And yet as we enter the new millennium, I find myself the Jewish dean of that Catholic and Jesuit Law School just down the street. It is really true that God works in mysterious ways—sometimes She even works in shocking ways!

And when I became dean many people were shocked. My appointment was startling. Marquette University had existed for 115 years, and I was the first Jewish dean of any college. Our Law School became part of Marquette in 1908, and I was the first non-Catholic dean in all that time. During that ninety-year history I was only the second person who was not himself a graduate of this Law School. Some people were even more surprised by the fact that the University had chosen a "liberal" as dean, and a liberal who was best known in this State as a former State Public Defender.

My liberal friends were actually more flabbergasted by my appointment as dean. Any number of people asked me "how could" I be dean of a Catholic law school when they assumed that my personal point of view on some social issues was not consistent with positions of the Catholic Church on those issues. Of course, these expressions of disbelief stereotyped both my views and the views of Catholics, as if the only things the Church cared about or I cared about were questions of sexuality and reproductive freedom. What was most interesting was that people who questioned my agreement with the teachings of the Church on such issues as abortion and homosexuality never once questioned my ability to be dean of a Catholic law school because I wasn't even Christian, much less Catholic. It has always seemed to me that if someone wanted a perfectly legitimate reason why I am an inappropriate person to be dean of a Jesuit institution, it isn't because of my view of social issues, it is the basic fact that I am not Christian.

* This speech was subtitled "Some Thoughts on Spirituality, the Legal Profession, and Religious Diversity" and was presented at "Experiencing God in the Workplace—A Day of Reflection" at Marquette University on October 15, 1999.

It has been extremely significant to me that, in all the interviews I went through before I was hired and in the four-and-a-half years I have been dean, no one at this University has ever asked my views on these high-profile social issues. I have been asked many times about what I can do—and do do—to further the Mission of the University. Or how my background and experience relate to my views on the role of teachers and administrators at a Jesuit law school. I have been asked to speak about my experience representing low-income people and the problems of legal access. When I was interviewing I wanted to make certain that everyone knew I was Jewish, even though it is actually on my resume and is an important part of my life activities. The Academic Vice President, Frank Lazarus, said he knew, and I really knew he knew. But then I said that if I should take this job I would continue to provide pro bono representation to indigents, almost all of whom are convicted felons, some murderers, and many who were frankly not very nice people. And Dr. Lazarus said immediately, that's one of the reasons the University wanted me here, because pro bono representation has always been very important to me. And to be honest that is exactly one of the reasons I came to Marquette. Since 1995 I have been involved in many university activities, I have spoken to alumni groups throughout the United States, I have discussed the meaning of Jesuit education and particularly the importance of our being a Jesuit law school. I have been asked to assist in the development of a Mission and Vision Statement for the University, and in all that time the issues that consume so much energy in the media have never even arisen. That should tell us something. It may be that there are more important issues relating to faith and spirituality than those discussed in *USA TODAY*, by politicians, and on radio talk shows.

And this is part of the problem: we have taken the "spirit" out of spirituality and the faith out of religion. One's view on individual, discrete issues has become more important than his belief in God or the ultimate acceptance of certain transcendent values and core beliefs. We want issues of religion, faith, and spirituality to fit a *USA TODAY* graphic or a thirty-second sound bite on the evening news. Belief in God is now being defined by your position on certain social and political issues. Or worse, belief in God is defined by how many times you *say* you believe in God.

We have allowed the view of people of faith to become stereotyped. Religious people are said to oppose abortion, handgun control, welfare, and homosexuals and to favor capital punishment, spending for the military, and public support of private schools. Frankly, most of those

views are crazy, upside down. Our popular culture has marginalized people of faith as being just another interest group, rather like labor unions, chambers of commerce, insurance companies, gambling casinos, and farmers. Moreover, all too often people of faith are portrayed as being out of the mainstream, a little kookie, and somewhat extreme, certainly right wing. As with so many other aspects of American life and popular culture, we have reduced spirituality, faith, and religious belief to simple-minded caricatures, almost cartoons in which the "religious" person is portrayed as a weeping Jimmy Swaggart or a made-up Tammy Faye Bakker.

There also is a sense of cynicism when these people talk about religion, faith, and spirituality. It is as if the only people who think about God and Godliness are those who want to use spirituality as a way to gain fame or fortune. I was at a program recruiting students for our Law School, and an older woman asked what our tuition was. I told her, and she responded: "Yeah, those Jesuits always understood about money." When I told her quite directly and in no uncertain terms that her statement offended me, she responded: "It's O.K. I'm a Catholic and I went to Jesuit schools." Clearly, she had missed something along the way.

I wanted to speak here today because it seems to me that something needs to be said about the diversity of faith and spirituality and of those who look to God and religion as a source of professional strength and support, and perhaps I am in as good a position as anyone to talk about those issues. In fact, my presence here today belies virtually all of the stereotypes about people of faith. And frankly, my friends, it is time that people like me were more direct. Faith, belief in God, and adherence to core human and religious values are not something limited to only some in our society—these are universal values that are to be embraced by everyone.

First, no one religion has a monopoly on spirituality, faith, or religion. There are people of all faiths who believe in the importance of a Higher Spirit and the impact that Spirit has on their daily lives. While some of these people are certainly Christians, others pray in different ways, follow different rituals, and may have different systems of beliefs. The Native American faiths, Buddhism, Islam, Judaism, and other religions practiced by relatively few people in the United States are legitimate ways of expressing a belief in God and in being a good and spiritual person. God is nonsectarian and nonparochial, and She takes joy in all people of goodwill wherever they pray, in whatever language, and through any ritual that respects human beings.

Secondly, we must reject those in our society who apply social litmus tests to decide whether someone is religious, God-fearing, or a person of faith. God is neither a Democrat nor a Republican. God does not have a political agenda. God has many agendas, and they are not susceptible of pigeon-holing into a political box. I tell people who think that Christians are right wing to read the Sermon on the Mount; I tell people who disagree with the position of the Catholic Church on abortion to look at the work of the Church in caring for the needy, the impoverished, the seriously ill. Catholicism is about a lot more than abortion and homosexuality. I tell people who complain about the role of women in orthodox Judaism to read the Talmud and consider the extraordinary ethical values that relate to family, to women, and to human interaction.

Those people who want to ridicule faith and religious belief can take bits and pieces of ritual or teaching out of context. This is no more appropriate than taking a chip out of the Sistine Chapel ceiling and then describing Michelangelo's masterpiece as nothing more than an ugly piece of colored plaster. Religion is a transcendent set of values governing our entire lives, not just selected bits and pieces. Religious faith is not a multiple-choice test, in which you have to gain a "passing" score on some key points. There are deeply spiritual people who are "pro choice," and there are people of goodwill and deep religious faith who support capital punishment and handgun ownership. And you and I both know that there are men and women of every faith and every denomination who go to church and get their names in the church bulletin every week but who besmirch God's name and God's teaching—people who, while professing to be religious and righteous, in reality promote greed and intolerance.

So long as issues of faith, spirituality, and religion are bound up with political issues, we are going to have a hard time helping people understand that Jesus's message of love resonates for everyone, even for people who are not Christian. The life and teaching of Jesus of Nazareth can inform the lives of men and women of all faith traditions, just as the wisdom of the Talmud, the Koran, and the eastern prophets has important messages for everyone. We must shed the parochialism of spirituality and talk directly about why it is important for all of us. It is not something to be embarrassed about, it is something to be proud of. It makes us better people, not narrower or more filled with bigotry.

I am often struck by the similarity of the core messages in Christianity and Judaism. While this is not surprising, considering that they both come from the same source, often this basic fact is overlooked

or trivialized. I have been nourished by my association at Marquette with members of the Society of Jesus and by my contact with deeply committed Catholics. Perhaps I have rubbed off on a few people, although I must admit that I am always worried that people will view me as representative of Jewish people generally. There is no more a "typical Jew" than there is a "typical Catholic," and such stereotyping really doesn't advance our concern about the Godliness of all people.

I know I shouldn't minimize the difference in beliefs. Catholics believe different things from Lutherans, and Christians believe some different things from Jews or Moslems or Buddhists. We all know that. However, so long as we don't start saying or believing that "my religion is better than your religion," we can work together to accept and appreciate the differences of our beliefs and not allow the differences to make impossible the dialogue on issues of common ground. This is true even if our beliefs do not always coincide. Christianity and Judaism are inconsistent in some basic respects. That has to be noted. But if we spend the rest of our lives emphasizing those differences and refusing to recognize the multitude of ways in which our vision of God is coextensive, we will have squandered our time on earth. I choose to focus on those many, many areas in which all persons of faith agree, not those areas of disagreement.

Now how in a practical everyday way has my belief in God affected the work I do? How does it make a difference for me, personally? First, let me say that often I fail. I would hate anyone to hear this talk and then point out that I sometimes do not live up to my own expectations. That is true, and it makes me feel guilty, but it doesn't make me a hypocrite. None of us are perfect, we all slip off the straight and narrow. The fact that we don't always practice what we preach does not mean that the goal is unworthy or that we cannot strive to achieve the goal. Nor does it mean that we are not good people because we have bad days or because we do not achieve perfection.

Recently I was at a meeting of Jesuit educators and one dean described his procedure for hiring new faculty. He said that he always had a meal in a restaurant with the prospective faculty member to observe how that person interacted with the wait-staff. The dean's attitude was that if a faculty member did not show respect for a server in a restaurant, that person would probably not be respectful to students or colleagues. That made a lot of sense to me. Acting with love and kindness towards everyone is one of the easiest—yet hardest—things we can do. Kindness is one of the bedrock principles of every religious faith. Hospitality toward strangers, charity for the widow and orphan,

concern for the disabled. St. Ignatius talked about *cura personalis*, care for the whole person, but often we pay only lip service to this teaching.

We have made legal education an ordeal, in which some instructors have viewed their role as trying to portray the most unreasonable, unpleasant, and demeaning judge or opposing lawyer a law student will ever have to deal with in the "real world" of law practice. This has had two effects. First, it made whole generations of students, at Marquette and elsewhere, loathe and despise everything about their legal education. Indeed, many graduates of our Law School will tell you that they *never* met any judge or opposing attorney who ever gave them as much grief or as much stress as their professors in law school.

Secondly, and more importantly, generations of law students thought they were being taught that in order to be a good lawyer, a zealous advocate, you had to be a son-of-a-bitch. Somehow, in the midst of talking about the teaching of St. Ignatius, we have turned out lawyers who try to win cases by being personally offensive, by being snide, sarcastic, and by generally being unreasonable and difficult to deal with.

Worse yet, some lawyers have taken this attitude a step further to cut corners, to be unpleasant—or even to be dishonest. This emphasis on sarcasm, personal attack, offensive personality, and lack of cooperation can turn into a contempt for opposing counsel, for opposing parties, for our system of justice, and for the rule of law in general. I have never seen any statistics on the number of lawyers who have been subjected to attorney discipline based upon the law school from which they graduated, but it would appear to me that an education at a Catholic and Jesuit law school which has a mission based on the teaching of Jesus Christ and St. Ignatius of Loyola has not eliminated or even necessarily reduced the percentage of graduates who are dishonest or are subject to professional discipline. To me that is very sad and quite troubling.

One of the ways we can all put faith, spirituality, and religion into practice is simply by being nicer to everyone. To servers in restaurants, to our support staffs, to our colleagues, to opposing counsel, and to everyone we come in contact with. That would be an important first step. *Cura personalis* means that the Golden Rule is operative even in law offices, even at depositions, and even in "lawyer letters" we send to opposing parties and their counsel.

In the last few months I have been studying the Talmud with a rabbi here in Milwaukee. We have been studying part of the Talmud called *Ethics of Our Fathers* which is really a primer on basic moral values and how those values shape our everyday life and everyday conduct. One of

those values that I use every day is a traditional Talmudic teaching that you should give everyone the benefit of the doubt. You should not assume the worst about people; you should not assume the worst motivations for everything others do. And you should not say bad things about people. There is actually a foundation in New York which is established exclusively to promote the elimination of *lashon hara*, which in Hebrew means a "bad tongue" or speaking evil. Could you imagine how the legal profession would be different if the Model Rules of Professional Conduct forbade saying bad things about other people except where necessary to advance the legitimate cause of a client? In fact, the lawyers' oath in Wisconsin now forbids engaging in "offensive personalities" ("I will abstain from all offensive personality and advance no fact prejudicial to the honor or reputation of a party or witness, unless required by the justice of the cause with which I am charged"), but very few lawyers have ever been disciplined for violating this provision in the oath. Perhaps the Wisconsin Supreme Court should start more aggressively enforcing that part of the oath, perhaps even beginning that enforcement with themselves.

Our profession would be different if we assumed that opposing lawyers were dealing fairly and honestly with us. The world generally would be a better place if we did not act on negative perception, assumption, or rumor, and waited for proof before we took some step that brings discomfort or anguish to someone else. This, too, is a very Christian view. This, too, is a very Talmudic view.

I find great strength from the Talmud because it is a remarkable framework for basic human and legal ethics on the one hand, but it is also an action plan for modest behavior and good interpersonal relations. In my present work I am frequently confronted with people who say and do extremely inappropriate things or who exercise abysmal judgment. They may be students, they may be my colleagues on the faculty, or they may occasionally be University administrators. Sometimes I ask an alumnus for money, and he responds with the most outrageous story about why he can't give any money to the Law School—which leads me to believe that the prospective donor must really take me for a fool. When I was public defender I often represented people who lacked common sense, who were incredibly immature, and who were meanspirited or evilly inclined, who would deny the crime and come up with the most ridiculous explanations.

But you know what, that eighty-year-old alum who told me he had three children under the age of six might have been telling me the truth, and certainly I can point to cases in which a criminal defendant told me

something that I was morally certain was a lie but that turned out to be true. One of the important lessons I learned early on as a young lawyer was always to consider the possibility that I was wrong. That has proved a very important lesson.

One of the people who taught me this was E. Harold Hallows when he was Chief Justice of the Wisconsin Supreme Court and I was the clerk for Justice Horace Wilkie. A lawyer was arguing in court about the terrible injustice the lower court's judgment had been to his client. The lawyer was going on and on about how horrible the judgment was and how it had ruined his client's life. After about fifteen minutes of this litany of horrible consequences, Chief Justice Hallows interrupted the lawyer and asked, "Have you ever considered what will happen to your client if we affirm the judgment of the circuit court?" The attorney answered: "No, Your Honor, I have never thought about that." To which Hallows replied: "You'd better start thinking about it."

Sometimes as lawyers we confuse our arguments with the truth. We confuse our position with the moral law. Occasionally we get so emotionally involved in our argument that we lose our ability to assess the case. We forget about the client, about the law, about justice, and just keep pushing the issue. We have become blinded by our own advocacy. We all must step back and admit that sometimes each one of us is wrong. I can now freely admit that of the almost 500 appellate cases I have lost, in *several* of those cases my position was not legally correct. We must all consider the possibility that we are wrong. We may be loud, we may be angry, we may be indignant—but we may still be wrong.

But being polite and kind doesn't mean being submissive. In most cases, honesty is the best policy. I must admit, sometimes I say exactly what I am thinking—and I am often very direct. In some circumstances it is necessary to identify and point out the transcendent value, the ultimate principle of good. Jesus did this; Moses did this; Ghandi did this; Martin Luther King did this. There is a great need in our society for people who have the courage to say that the Emperor is naked, and not only is he naked, he is also not very honest. Some things are considered "politically correct" which are morally wrong or intellectually foolish. Neither Abraham, Moses, Jesus Christ, nor St. Ignatius was politically correct. None of those men were apologists for the status quo. It is necessary—essential—to take moral stands and stick to them in the face of those who favor political convenience, relative truth, or a least-common-denominator code of ethics.

If that means that a judicial candidate loses an election because she

refuses to respond in kind to the negative campaign of her opponent, that is a price each of us must be willing to pay. And those of us in the legal community must have the courage to condemn improper behavior by such candidates and acknowledge moral and ethical courage in others when we see it. If taking the high road means that opposing counsel gains a momentary advantage by lying or acting improperly, that is a small price to pay. Because the fact is that, in the end, the righteous do prevail. And that is true even in adversarial litigation.

Morality and spirituality in the practice of law and in the way we live our lives begin with us. If we don't do it, no one will. When referring to unethical, immoral, or meanspirited conduct, or to corner-cutting, or to unethical behavior, it is no answer to say that "everybody is doing it." "Everybody" must end with each of us!

Nowhere is that duty greater than in law teaching. I am in a better position than most of you—perhaps any of you—to influence members of the bar, and particularly future members of the bar. Legal education must be transformational; and nowhere is that more imperative than at a Jesuit law school. We must transform our students into lawyers. But transformation does not mean that I am trying to "unteach" the moral values our students bring to us. It means building on the core values our students bring to us, and you will be happy to know that they still bring those values. I tell students that the Federal Rules of Civil Procedure do not supersede the Ten Commandments. Core values our students learned in church, in school, and at home before law school remain core values while they are in law school and after they are admitted to the bar. My task is to take that basic moral upbringing our students have and to use and expand those values to produce ethical, moral, and highly competent lawyers.

I tell law students on their first day of orientation at Marquette that the primary task of a lawyer is to resolve a client's problems as quickly, as inexpensively, and with as little acrimony as possible. I tell them that as attorneys we must regard ourselves as a "helping" profession in the most literal sense of that term. Law teachers have a special duty to teach students not only substantive law and procedure, not only the skills necessary to be a successful lawyer, and not even just the ethical rules adopted by the supreme court. We must be prepared to teach students to be good and moral citizens in the fullest sense of those words.

I am frequently asked whether we need more lawyers. I have a stock answer: we need more *good* lawyers, but we already have too many unpleasant and obnoxious people practicing law. We have to be more

than ethical, we have to set an example to our clients, whether the client be a criminal defendant, a large corporation, a personal-injury claimant, or a unit of government. We all know lawyers whom we recognize as the best in our profession, and the one thing they each have in common is that they automatically take the moral high road. The lawyers who earn the most enduring legacy as outstanding practitioners are those men and women who combine a firm grasp of substance, highly developed skills, and a moral and ethical grounding that is beyond reproach. And it is my job as a legal educator to turn out law school graduates who are prepared to seek that level of excellence at the bar.

I also serve on the Wisconsin Board of Bar Examiners appointed by the Wisconsin Supreme Court, and we have taken an increasingly hard stance on applicants who show a general disregard of honesty, candor, and professional and mature behavior. Our profession simply cannot accept applicants who have lied on their law school applications, lied on their bar applications, and have a history of dishonesty and ethical violations in the past. Youthful transgression is one thing, but deliberate and systematic dishonesty in someone seeking admission to the bar is another; and it is unacceptable. In Wisconsin, at least, we expect more and we demand better.

But every lawyer has the duty to rid our profession of those who operate on the edge, who violate their oaths as lawyers, and who make a mockery of our duty to act as helpers and peacemakers and to prudently advise our clients. We must start with ourselves, with our partners and colleagues, and with the younger and newer lawyers we supervise. We must honestly look at the words we use, the tactics we employ, and the way we conduct ourselves. In our practice do we sink to the level of our opponent? Are we abusing discovery because we are litigating against an obnoxious opposing counsel? Are we using our skills to resolve the dispute or to solve the problems of our clients, or are we more concerned with making the point, turning the clever phrase, or making someone else look foolish or inferior?

What do we teach the lawyers in the firm about the culture of the firm and the culture of the profession? We tell young associates how many billable hours we expect, but are we equally clear on the type of conduct we expect? How many of us take seriously the provisions of Model Rule 2.1 that encourage lawyers to advise our clients on the "moral, economic, social and political" ramifications of their actions? And, most importantly, are we really serving our clients by playing hardball all the time, by gaining a reputation for being hard to work with and unreasonable?

It is possible to be a good person, a decent person, and a moral person and not believe in God. Going to church is not a condition precedent to being a spiritual person, or even a religious person. We all know people who go to the synagogue on Saturday or church on Sunday and spend the rest of the week ignoring the message of the Testaments, Old and New.

But let me say this: a *sincere* belief in God and a religious faith are certainly helpful to shaping our behavior. I suppose that in the abstract it is possible for a person independently to develop the moral values of the Torah, the prophets, the New Testament, the Koran, the Book of Mormon, and all the other holy writings without any religious training, without ever studying theology or going to a religious service. But it won't be easy and it will consume most of that person's life. Most of us are not that smart and don't have that much stick-to-itiveness. The transcendent values of religious faith have stood the test of time—that is why they are transcendent. While we should never accept things blindly, for me there is a basic set of religious principles that I accept. Spirituality and faith are not elements of proof in a jury trial; they are moral values developed over hundreds of years which have molded our civilization, and mostly for the good.

We can and must bring God into our workplaces. That doesn't require a Bible on the desk or a mezuzah or crucifix on the wall. That doesn't even require group or public prayer. Because those symbols and prayers do not always have the same meaning to everyone. What can be comforting to one person may be deeply disturbing, and even offensive, to other people. But bringing God into our daily lives and our daily work does require that His message change how we conduct ourselves, every day, in every situation. How do we interact with our colleagues, with our staff, with our opponents? What language do we use? Do we go out of our way to do pro bono work, to help the needy, to listen to those who have problems? Living a spiritual life must become "business as usual" for each of us, Jew or Gentile, Christian or Moslem. We each bring to our work our experience and our religious faith, and that is of critical importance, but our faith and religious value system must transcend work as lawyers, as teachers, as judges and extend to all persons of goodwill. If we succeed in doing this we will have advanced God's will and our individual faith. Our clients, our colleagues, our students, and society will be better served. We will be better and more effective attorneys, and altogether better human beings.

Howard B. Eisenberg—He Cast Such a Marvelous Light

JOHN J. KIRCHER*

Someone once said, and it may well have been me, that one's first impressions can often be very deceiving. To this day I vividly remember the late afternoon of October 30, 1994. As chair of the Marquette University Law School Dean Search Committee, I drove to Mitchell Field to collect a candidate named Howard B. Eisenberg. He was then serving as Dean at the University of Arkansas Little Rock School of Law.

I knew that part of my task was to sell Marquette to the candidate, as much as his was to sell himself to us. Those who know me well realize that I am not much for "small talk." Nevertheless, I spent the trip to the airport convincing myself that I had to bend every effort to engage our candidate in conversation. On the trip back to downtown I tried very hard to do so with Howard. However, his responses to my "best stuff" were a series of short, at times one-word, answers. After dropping him off at his hotel, I sat in my car for a few moments reflecting on what had just transpired. My reaction, I must admit, was negative: Boy, isn't this guy a man of few words?! How will he interact in a fundraising mode with potential benefactors of the Law School?! How will he deal with my often-verbal colleagues?!

That evening, during a dinner with Howard and other members of the search committee, my mindset did a complete about-face. He was able to adroitly field numerous questions and weave into his answers an overview of his vision of the role of a law school dean, particularly one at a Jesuit law school. His view of a Jesuit law school made a dramatic impression on me. As a product of Jesuit education from high school through law school, and now working for the good fathers, I found Howard's insights among the best that I had heard in over thirty years.

Throughout the evening what we later came to recognize as Howard's somewhat dry sense of humor shone through. Needless to say, the others and I came away from the dinner with the view that Howard had set the norm by which all other candidates would be judged. That perception only strengthened during the following two days when Howard met with members of the faculty, students, alumni, and members of the University's central administration. The rest, as they say, is history. When the interviewing process was over, all

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constituencies favored Howard Eisenberg as the Law School's next dean. At Christmastime the Marquette Academic Vice President and President made it official.

Looking back on Howard's seven years as our dean it is impossible to describe adequately the profound impact he had on the law school family and countless others whose lives he touched. To describe him as a workaholic would be a gross understatement. Except when Howard was out of town, I cannot remember a time—day, night, holiday, weekend or workday—when I would pass the Law School and not see his little blue SUV, with the large Cubs logo on the spare tire, parked near the Eleventh Street entrance. He appeared to be constantly at work, whether on a law school project, his legendary pro bono cases, answering media questions on law-related stories, or the many and varied committees, commissions, and boards on which he served. His open-door policy grew to be legendary. He never appeared to take a vacation because he practiced what he preached—selfless work on behalf of others, particularly those who found themselves marginalized. In fact, sitting at his funeral, the words of Edna St. Vincent Millay kept going through my mind:

My candle burns at both ends;
It will not last the night;
But ah, my foes, and oh, my friends—
It gives a lovely light![†]

Howard B. Eisenberg cast a very marvelous light on all connected with the Law School, and on countless others, during the last seven years. The light was extinguished much too soon. Nevertheless, the afterglow will linger for a long, long time.

SHIRLEY A. WIEGAND*

In late August 1998, I had just returned from a three-week vacation abroad. I was refreshed, rested, and enthusiastic about the new semester. As a law school faculty member, I had only to worry about the two courses I'd be teaching, my next law review article, and the fairly minor service requirements expected of all faculty. Life was good.

[†] Edna St. Vincent Millay, *First Fig*, in COLLECTED POEMS 127 (1956).

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On my first day back, I stopped by the Law School to check on mail and other last-minute details surrounding a new school year. As I popped into the dean's office to let Howard Eisenberg know I was back in the country, he invited me into his office. As was his style, he got right to the point. He explained that the current associate dean had agreed to assume a university administrative post and would be leaving the Law School. Then lowering his head sheepishly, he asked me to become his new associate dean. My immediate response was "no." I told him that I could not and would not do it and explained that I had been heard on numerous occasions telling my family and friends: "If I ever become an administrator, just shoot me." I loved my life as a faculty member and had absolutely no interest in administration. He seemed to accept that. He said he would not beg me. That night, my husband and I broke open an expensive bottle of wine and celebrated my courage and wisdom.

The next morning I arrived at the office to find this e-mail (which I printed and saved to this day): "I'm still not begging, but would you do it just for this semester . . . ?" After another earnest conversation, I agreed . . . just for the semester. I did so because I liked and respected Howard, but primarily because I felt a deep loyalty to the school. Little did I know that I would remain Howard's associate dean until the day he died. This essay will explain why.

Before I became his associate dean, I barely knew Howard even though he had been my dean more than two years. We had conversed several times, only once or twice regarding anything significant. During my first few months as associate dean, this didn't change very much. Howard was not one for chitchat. When I needed an answer, he gave it to me, but we never "hung out" in each other's office. We were both too busy, and it just wasn't his style.

Howard was heavily involved in fundraising, shoring up university support, representing (pro bono) criminal defendants and others, and serving in a host of positions on various state boards and commissions. As the days passed, he turned more and more of the law school management over to me. And more and more as I asked Howard for guidance, he freely gave it, generally concluding, "It's your decision; I'll support you." He increasingly demonstrated faith and confidence in me—a confidence that I myself lacked. More and more he grew to trust me, knowing that what we discussed would be kept confidential. More and more we began to work like a team, generally reaching the same resolution to difficult problems, feeling comfortable with each other, and arriving at a fairly clear understanding of our respective roles.

I came to see that Howard dedicated himself to the service of others; he seemed to turn no one away. On occasion I'd receive a bizarre and nearly incomprehensible request from a prisoner in a far-distant prison. Who knows how he'd come across my name? Having little experience in criminal law, I'd share these with Howard, and inevitably he'd take the letter from me and respond; this prisoner would join his long list of "pen pals."

At the end of my first (and presumably only) semester as associate dean, I decided to stay on. The relationship Howard and I had formed, along with his dedication and intellect, kept me in the job for the next four years. Howard served as a role model in many ways and, though I have had many bosses in my life (all of them male), none ever showed me the respect, trust, and confidence that Howard did. He believed in me, and so, in time, did I.

Howard was not perfect. He worked entirely too hard, spending seven days a week in his office, often twelve to fifteen hours a day. He did not spend enough time with his family. He often paid more attention to his prisoner clientele than his own faculty and staff, thereby ministering to those he believed most in need. He refused to take meaningful vacations, though I chided him regularly and extolled the virtues of relaxation every time I returned from my own furloughs. But I came to learn that Howard's work habits were long-standing and persistent, part of his character, so eventually I gave up.

Though he was not perfect, he was better than most. When he arrived at Marquette University Law School in 1995, he had many goals, several of them related to finances. He wanted the Law School to retain more of its tuition revenue. He wanted alumni to contribute more than they had in the past. He wanted to increase scholarship funds for entering students. During his tenure, he accomplished these goals and more.

When Howard arrived at the Law School, relations between the school and the University were poor. But working with a new university president, Howard saw opportunities for improvement, and relations warmed considerably; today the Law School and University enjoy an excellent relationship. Over the course of a couple of years Howard was able to negotiate a beneficial financial arrangement with the University that permitted the school to retain seventy-eight percent of its tuition revenue, rather than the previous sixty-five to seventy percent. The school was also permitted to raise tuition and establish significant financial independence. Those are significant structural changes.

In addition to his focus on university relations, Howard began to

visit alumni as soon as he arrived in Milwaukee. Although many of those with whom he worked never considered him a particularly outgoing or sociable person, Howard harnessed an ability to charm hundreds of alumni over the course of countless breakfasts, lunches, and dinners. This did not come naturally. At some receptions I attended with him, he would stick to my side as if we were old friends. Eventually, I'd mention that perhaps we should circulate. Once he ventured out into the crowd, he seemed to enjoy himself, and others certainly enjoyed their conversations with him. Alumni who had never given before began to contribute; those who had given \$50 in the past began to write larger checks. Howard was like magic on some of his fundraising excursions. He'd listen patiently to the disgruntled alumni, then point out how much the Law School had changed and invite the graduates to come visit the school and see for themselves. He was a tireless, enthusiastic cheerleader for the school, the faculty, the building, the University.

Alumni across the country reported that they began to give solely because of Howard. During his first year, he raised \$354,000, about the same as in prior years. But the amounts increased regularly: over \$500,000 in 1996-97, nearly \$1,000,000 in 1998-99, and nearly \$2,000,000 in 2001-02 prior to Howard's death.

These changes were instrumental in achieving some of Howard's other goals, always in the service of others. He was able to improve the financial circumstances of everyone in the school. Faculty, staff, and administrator salaries increased significantly. Faculty were awarded substantial summer research grants and professional development funds, fulfilling Howard's goal of encouraging faculty to produce more and better scholarship and rewarding them when they did so. The building was upgraded and renovated, and sophisticated technology was installed in two new "smart" classrooms. In addition, student scholarship money increased from less than \$500,000 to over \$1,500,000 per year.

Many in the school and throughout the State noted and appreciated Howard's achievements. What they often did not see (or appreciate) was the private human being behind these significant public achievements. Howard's personal character impressed me as much as his public persona.

Many are aware of his sense of humor, especially those who worked with him and met him in public. He often brought laughter to the Law School's administrative offices, and he frequently stopped by my office to share a funny story. But he also possessed a tremendous capacity to forgive, to slough off an unkind remark, to attempt to understand the

motivation behind seemingly irrational behavior. I've seen him angry on occasion, but generally after a few minutes of venting (to me, not to the person who created the anger in the first place), he'd set about trying to understand the person or event that occasioned the anger, and then move on. He held no grudges that I could detect. In fact, when my feelings were hurt, when someone slighted me, when my own decisions created conflict and controversy, Howard was the person to whom I turned for guidance and advice. In time, we did occasionally "hang out" in each other's offices, generally when one of us needed to work through a recent problem. Howard taught me to let go of anger and hurt and reminded me to see the goodness in everyone.

One morning, a year or two before he died, Howard came to my office door and said that he had learned about bowing in the Asian tradition. He said that bowing to someone signified humility in oneself and was a sign of respect for the other. He told me he respected me and he appreciated the difficult job I was doing. Then he bowed. Thereafter, every day that I saw Howard, he bowed. If he forgot to do so first thing in the morning, he'd find an opportunity to do so later in the day. And every time he did it, that simple act reminded me of his generous spirit and his humility.

I sense that Howard's time at Marquette University Law School was similar to time he spent at other institutions. Other essays in this issue no doubt bear that out. No matter where he went, he created positive change and inspired those with whom he came in contact. I count myself blessed to have been among them. I am not the same person who breezed into his office four years ago after a three-week vacation. Because of Howard, I am better.

Howard Eisenberg—"Social Engineer"

PHOEBE WEAVER WILLIAMS*

In reflecting upon the life and work of Dean Eisenberg, I am reminded of another dean, Charles Hamilton Houston, who like Howard Eisenberg performed great works during his lifetime and inspired greatness in others as well. Howard Eisenberg and Charles Hamilton Houston were alike in a number of ways. They both articulated missions that went beyond fulfilling their responsibilities as

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chief administrators of law schools. They both recognized that legal skills and training could and should be used for larger purposes than self-aggrandizement and self-promotion.

As Vice-Dean¹ of Howard University Law School from June 30, 1929 to July 1, 1935, Charles Houston identified as his mission the training and education of African-American lawyers who could successfully battle in the courts legally sanctioned racial segregation and discrimination.² Charles Houston was the architect of the legal strategy that led to *Brown v. Board of Education*³ and an accomplished practitioner of "social engineering" jurisprudence.⁴ As Dean of Marquette University Law School, Howard Eisenberg's mission was to train competent and capable attorneys who would bring their faith and religious value systems to their daily work as lawyers, teachers, and judges.⁵ In the words of Dean Eisenberg, "Law teachers have a special duty to teach students not only substantive law and procedure, not only the skills necessary to be a successful lawyer, and not even just the ethical rules adopted by the supreme court. We must be prepared to teach students to be good and moral citizens in the fullest sense of those words."⁶

Several principles guided Charles Houston's call to lawyers to serve as "social engineers." A few of them are discussed here. As early as 1936, Charles Houston expressed a belief in the basic goodness of the American public. For Charles Houston, the "real American public" included "millions of white people, North, East, West and even South [who were] not vicious but just misinformed or completely lacking in information."⁷ Charles Houston recognized that African-Americans

1. Spottswood W. Robinson, III, *No Tea for the Feeble: Two Perspectives on Charles Hamilton Houston*, 20 HOW. L.J. 1, 3-4 (1977) (noting that although Houston led the law school his salary was a "monetary pittance" and that, therefore, Houston declined the title of "Dean" until the law school provided him a salary "commensurate with the rank and office of 'Dean'"—which, unfortunately, never occurred) (quoting remarks of the late Judge William H. Hastie).

2. See *id.* (noting Houston's success in making the vision of "superior professional training and extraordinary motivation calculated to prepare the professional cadres needed to lead successful litigation against racism" a "functioning and effective reality").

3. 347 U.S. 483 (1954).

4. Michael Wilson Reed, *The Contribution of Charles Hamilton Houston to American Jurisprudence*, 30 HOW. L.J. 1095, 1097-1100 (1988) (describing Houston's legal strategy for overturning de jure segregation in the United States).

5. See Howard B. Eisenberg, *What's a Nice Jewish Boy Like Me Doing in a Place Like This?* [This speech is reproduced as part of this issue. See *supra* p. 336.—ED.]

6. *Id.* at 344.

7. J. Clay Smith, Jr., *Principles Supplementing the Houstonian School of Jurisprudence:*

thus must influence public opinion. Likewise, Howard Eisenberg challenged us to recognize what he termed the "Godliness" in others.⁸ Howard Eisenberg called upon persons from diverse faith traditions to speak the truth about the roles that faith and spirituality play in their professional lives and challenge the cynicism and stereotyping directed towards them by persons who are uninformed about their faith and spirituality.⁹

Charles Houston identified the priorities he would pursue during his six-year term as the chief administrator for the Howard University Law School. One priority was to enhance significantly the national reputation of Howard University Law School by gaining accreditation for the law school and membership in the American Association of Law Schools.¹⁰ Houston accomplished this goal by raising admission standards, improving the library, implementing personnel changes, expanding the day program, and establishing a lecture series that exposed Howard's law students to leading figures in American law.¹¹ Despite numerous challenges associated with the initiatives to enhance the stature of Howard University Law School, Charles Houston advanced an even larger mission. He inculcated into the very culture of Howard University Law School a commitment to the abolition of racial segregation and discrimination through litigation challenging the constitutionality of discriminatory laws and practices. Charles Houston led by example, living as well as professing his values of commitment and dedication to the cause of civil rights reform. He taught classes, served as vice-dean, and litigated civil rights cases, assuming a schedule that taxed his physical resources. His efforts created an enduring institutional culture at Howard University Law School that produced graduates who would continue his work long after his untimely death at age fifty-four from heart disease.¹² Aware of his impending demise,

Occasional Paper No. 1, 32 HOW. L.J. 493, 495 (1989) (quoting Charles Hamilton Houston, *Don't Shout Too Soon*, CRISIS, Mar. 1936, at 79).

8. Eisenberg, *supra* note 5, at 340.

9. *See id.* at 339 (explaining that persons of faith should "shed the parochialism of spirituality and talk directly about why it is important for all of us").

10. *See* Leland Ware, *A Difference in Emphasis: Charles Houston's Transformation of Legal Education*, 32 HOW. L.J. 479, 481-86 (1989).

11. *See id.* at 485-86 (noting also that Houston even lengthened the school year for the law school).

12. *See id.* at 487 (noting that Supreme Court Justice Thurgood Marshall was one of Charles Houston's former students: as a law student, Marshall traveled with Houston and other members of a defense team to Virginia to defend an African-American man accused of murdering two white women; Marshall risked his life to get sandwiches and refreshments for

Charles Houston, with humility and repose, expressed confidence that his mission warranted his sacrifice. He offered the following words of comfort to his son: "I . . . went down fighting . . . , and in any fight, some fall."¹³

During his tenure as Dean of the Marquette University Law School, Howard Eisenberg was driven by values and principles that were, in his word, "transcendent," larger than goals for personal success.¹⁴ Like Charles Houston, Howard Eisenberg identified the priorities for his administration of the Law School. He focused his energies on addressing them. Through numerous speeches and meetings, Dean Eisenberg connected with alumni of the Law School, significantly increasing alumni support and donations to the Law School. Howard Eisenberg recognized the importance of financial resources to the success of any cause or institution—a principle that Charles Houston also acknowledged as necessary to the cause of civil rights. Howard Eisenberg inculcated into the culture of the Law School a "spirit of generosity" as well as academic excellence. For many students, Marquette became a "kinder, gentler" law school than it once had been. Likewise, students and faculty, impressed by Howard Eisenberg's commitment to the provision of pro bono legal representation, embraced his mission. During Howard Eisenberg's deanship, student interest in public interest work and pro bono representation increased significantly. Through his pro bono work, Howard Eisenberg brought not only legal assistance but "legal existence"¹⁵ to persons who were social and legal outcasts. He gave hope to the incarcerated who, but for his pro bono representation, would not have their cases heard in appellate forums. Through his example, Dean Eisenberg inspired students, members of the faculty, and our colleagues in the legal community to make pro bono representation a central component of their professional lives.

"In any fight, some fall." These words hardly seem sufficient when one considers our loss. Yet, Charles Houston's words are a fitting

the defense team); Genna Rae McNeil, *Charles Hamilton Houston: 1895–1950*, 32 *HOW. L.J.* 469, 474 (1989) (recounting the life of Houston, who was born on September 3, 1895 and died on April 22, 1950).

13. McNeil, *supra* note 12, at 477 (quoting JOSHUA LIEBMAN, *PEACE OF MIND* 48 (1946)).

14. Eisenberg, *supra* note 5, at 339, 343, 346.

15. Smith, *supra* note 7, at 500 (explaining that "Houstonian jurisprudence recognizes that the law is a tool for social engineering and may be conceptually applied to free human beings from a status of legal nonbeing to pure legal existence").

memorial to Howard Eisenberg. They remind us that Howard Eisenberg embraced a vision and a mission that was larger than his life. The greatest tribute that we can offer to Howard Eisenberg is to embrace his mission.

ANDREA K. SCHNEIDER*

I will remember Howard most in three areas—his commitment to the Jesuit mission and helping others, his focus on fostering scholarship within the Law School, and his wonderful sense of humor.

I first learned about the Jesuit mission when I was applying for a teaching job at Marquette Law School. It was Howard's first year as dean of Marquette—1995–96—and I would be among the first group of faculty that he hired here. After a full day of faculty interviews, a presentation to the faculty, and lots of the same questions ("So, why do you want to be a law professor?" "What can we tell you about Marquette?" "Could you see yourself living in Milwaukee after spending your whole life on the East Coast?" etc.), my last appointment was with the Dean. I walked in and was greeted with a big smile. We talked about some mundane issues and then, without warning, he said, "So, you probably want to know what it is like being Jewish at a Jesuit university." And yes, I did. It was not a question that I could ask many people! Without any hesitation, he explained that he found the Jesuit mission of the school—care for the whole person—completely consonant with his own values. He explained his commitment to helping others, the commitment he saw at the university level, and how this should all fit in with my values, too. He was so persuasive that a few weeks later I found myself explaining to my Jewish grandmother how a nice Jewish girl could go to teach at a Jesuit institution. In fact, I argued, echoing Howard's words, that a law school with values and a mission would produce better lawyers. I used to think back to our first conversation and wonder whether I was one of the "test" audiences before Howard went public years later with his talk "What's a Nice Jewish Boy Like Me Doing in a Place Like This?"[†]—but then I discovered that Howard always eschewed moot courts, and so I stopped flattering myself. In all events, as many have said, Howard Eisenberg understood the mission of the University better than most, regardless of

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[†] This speech is reproduced as part of this issue. See *supra* p. 336.—ED.

religion.

One of the reasons I came to Marquette was another of Howard's goals which we discussed when I was hired. In order to improve Marquette's reputation—and, more importantly, because he thought it was otherwise appropriate, desirable, and important—Howard wanted Marquette faculty to focus on traditional law review scholarship to a greater extent than in the past. I put him to the test. In my second year of teaching, I approached Howard with a project. I wanted to conduct a survey of lawyers in Milwaukee and Chicago regarding their negotiation styles. The study would be based on an earlier study and updated both to reflect changes in the bar and to add new material. It was a study that I had wanted to do for about five years. I explained to Howard my proposed logistics—they included gathering names from the Wisconsin and Illinois bars, repeated mailings to 2500 attorneys, statistical analysis from the Institute for Survey and Policy Research—and waited for him to tell me I was crazy. I was worried that focusing on a long-term project would not be good for tenure and that the expense would be prohibitive. (The last time such a study was conducted, the author applied for and received a grant from the National Science Foundation.) Howard, in no uncertain terms, told me that applying for grants would take valuable time away from my research and writing. He would find me the money, and I should start working on the research—not grant-writing. This was extraordinary support for scholarship. My colleagues at other schools still marvel that my dean so supported such a project! Just to complete the story, when I published the results of this study showing that adversarial lawyering was more likely to be ineffective, I asked Howard his advice on the title of the article. In his straightforward fashion, he suggested that the article be titled "Why Lawyers Should Not Be Jerks" (O.K., his language was even blunter than that). He was delighted with the results and how the empirical study supported what he always taught students.^{††}

There will no doubt be many reflections on Howard's humor in this book. One of my favorite examples is the time that we planned a surprise party for Janine Geske (a colleague on the faculty and now interim Dean of the Law School). Chuck Clausen, one of Janine's close friends, asked me for help in getting Janine to the party. Chuck and I came up with the idea that we should pretend that a professor in

^{††} The article was published as Andrea K. Schneider, *Shattering Negotiation Myths: Empirical Evidence on the Effectiveness of Negotiation Style*, 7 HARV. NEGOT. L. REV. 143 (2002).—ED.

alternative dispute resolution (ADR) was coming to visit and that Janine needed to join us for lunch. I was concerned, however, that, with Janine's busy schedule, she would end up having to cancel. We needed someone very important, but whom Janine did not know, in order to ensure her presence. So I went to Howard with our dilemma. His idea was that a wealthy donor would be visiting the school, potentially to give lots of money to the ADR program. So Howard got busy. He invented a full resume for Myron Rabinowitz (a fake name he had apparently used before), a wealthy donor who gave money to religious schools for the study of the area of faith, law, and conflict resolution. Howard's plans were quite detailed—we discussed the menu (kosher), determined how the women should dress (modestly, so as not to offend the very traditional Mr. Rabinowitz), and decided that Janine and I should spend time drawing up a gameplan for the ADR program if we received the additional funds that Mr. Rabinowitz was considering providing. Every time Janine would ask me another question about Rabinowitz, I went back down to Howard's office for more fabrication. Howard even drafted third-party letters talking about Rabinowitz to make the whole thing more believable. In fact, when Janine called Chief Justice Shirley Abrahamson to see whether she might know Myron Rabinowitz, the Chief Justice had been clued in and told Janine that she had heard very good things about him. It was an inordinate amount of work on Howard's part just for a good joke. But it worked. Janine walked into her birthday party and was completely surprised!

My last real conversation with Howard was in May before graduation. I wanted to review my travel budget with him for the next year. As opposed to prior years in which I approached him at the end of the year with requests for more money to cover what I had already spent, I decided that this year was going to be different. I put together a proposal with all of my likely expenses for the upcoming school year and wanted to get his approval in advance. Like most people, I hate asking for money and hoped that this proposal would make later requests unnecessary or at least less awkward. I walked into the meeting and sat down. Howard opened the meeting, "Well, we can do this one of two ways. I can say 'no' and you will complain for awhile and then I will say 'yes.' Or, I can say 'yes' right away. I prefer option number two." It was funny, it was wry, it was Howard. I'll always cherish that last conversation.

CRAIG ALLEN NARD*

Howard Eisenberg gave me a chance. You see, I am a graduate of a "regional" law school, which in and of itself, is, to quote Madison, "of inferior moment." But in the world of legal academic hiring, where it is common to measure one's scholarly potential based on one's pedigree, Capital University School of Law was an obstacle. There are serious barriers to entry into this tower, many variables at play, and political machinations aplenty. Indeed, academic hiring at law schools is an intensely competitive process, and law school alma mater, for reasons not entirely unjustified, is one of two factors that is scrutinized the most by would-be colleagues.

Howard transcended this culture. At the time Marquette University Law School hired me for a tenure-track position in 1997, I had already taught as a visitor at two other law schools, where I had unsuccessfully attempted to secure a tenure-track position. Therefore, needless to say, I was immensely grateful to Marquette (with Howard at the helm) when it saw fit to take me on. I'll never forget the phone call I received in January 1997, when Howard extended the offer: "Hello," I said. "Craig, this is Howard Eisenberg." That's all I needed to hear, for in this business "Ma Bell" is a friendlier conduit than the postman.

During my nearly five years at Marquette, I acquired a weighty admiration and respect for Howard. Indeed, as a fledgling law professor, I was most fortunate to have Howard as my first dean. In a world of competing egos, he was never one to engage in self-promotion; rather, armed with a profound social conscience, he led by example. Howard made me feel welcome and that I was making a contribution to that fine Jesuit institution. And despite the sometimes grueling decanal demands, he always had time for me, just as he did for my former colleagues, students, numerous ill-fated persons within our justice system, the Archdiocese of Milwaukee, his family, friends, and Talmudic studies. The first time—and every time thereafter—I walked into Howard's office, thinking, of course, that what was on my mind at that particular moment was the most pressing of all concerns, Howard welcomingly greeted me, and said, "What can I do for you?" And one of the last times I paid him a visit, to tell him that I had been approached by a law school in Cleveland, he smiled—for he knew and appreciated

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that my family in Ohio and Pittsburgh was now part of the calculus—and said, "I knew this day was coming." Nonetheless, consistent with how he treated me throughout, he did his best to keep me at Marquette and wished me his sincere best when I left.

Howard—brilliant, tolerant, caring Howard—was a man who achieved much in legal academe, in the practice of law, and in life. He saw the best in the worst of people; he eschewed the worst in the best of institutions. As dean, Howard recognized that his faculty members could each uniquely contribute to the betterment of Marquette, without consideration from whence they came. It was my good fortune that he also recognized such for aspiring faculty members.

DANIEL D. BLINKA*

On behalf of the faculty, I thank Mr. Habush for his extraordinarily generous and compassionate gift. Speaking as a teacher, I am humbled because it is my honor to reflect for a moment on three lessons that I think students will draw from this occasion.

First, we commemorate this beautiful room, which will provide our students with a place for study, inspiration, and reflection about what lawyers do. I say "inspiration" and "reflection" because there are lessons that cannot be drawn from casebooks and lectures. This room is modeled closely after the English Inns of Court, the fountainhead of many of the freedoms and liberties so dear to us and that both Dean Howard Eisenberg and Robert Habush have devoted their careers to defending and preserving.

And this brings us to the second lesson, which transcends lawyer-like concerns over rights and due process. As students look about this room and reflect on the portraits, the plaques, and the physical space where we now are, they will undoubtedly reflect on Dean Eisenberg and his selfless devotion to the profession and the community, especially his abiding concern for those without representation. I use the word

* The writer is Professor of Law at Marquette University Law School. In reading this and the subsequent piece, one should know that in the year before his death Dean Eisenberg persuaded Robert L. Habush to make a substantial gift to the Law School to make possible the restoration of what had been known for decades as the Grimmelsman Courtroom. The gift was the largest in the Law School's history, and the beautifully restored room was expected to be named after Mr. Habush. Following Dean Eisenberg's death, Mr. Habush requested that the room be named after Dean Eisenberg. The Howard B. Eisenberg Memorial Hall was accordingly dedicated at the Law School on August 29, 2002, and Professor Blinka's and Mr. Habush's remarks on that occasion are printed here—ED.

"selfless" to describe Howard's legacy of service because it literally means a giving over of one's self to others, a word that exactly fits Howard's life. And these are traits he shared with Robert Habush, whose reputation as one of the Nation's preeminent trial lawyers has been forged in defense of many of those same rights and values.

Finally, we celebrate the lesson that Mr. Habush has taught all of us in his dedication of this room to Dean Eisenberg. This itself is an extraordinarily selfless act of kindness, compassion, and recognition of what Howard stood for. Our students will study law in this room, but the lessons taught by Dean Eisenberg and Robert Habush will ultimately prove far more valuable in making them good lawyers and, as important, good people.

ROBERT L. HABUSH*

Thank you. While I appreciate the introduction, today is not about me. It is about Howard. Everyone attending here who knew Howard knew that Howard was special. He was brilliant, and yet he was humble. He was serious, and yet he was funny. He was driven, but he was compassionate.

Every once in a while someone touches the lives of others in such a unique way that in describing his life the word "greatness" falls easily from our lips. And with respect to Howard Eisenberg's life, "greatness" is an appropriate label.

But, as Phyllis Eisenberg indicated a few moments ago, in time memories fade. And in time all of those who were close to Howard and connected to Howard will, with God's will, pass away as well. And so the memories of all the contributions that Howard Eisenberg made to the legal community and the community at large may fade, too.

That is why, Phyllis, that is why, Dr. and Mrs. Eisenberg, this had to be Howard's hall—because in future generations, visitors to this school and this room will look at the portrait, and they will look at this magnificent room, and they will say to themselves, "A great man must have walked the halls of this Law School. A great man must have taught students in this Law School."

And they will say to themselves, "This man must have touched the lives of so many people in such an important way." And *that* is why this had to be *Howard's* hall.

Thank you.

* The writer is a lawyer in Milwaukee.

TIMOTHY L. BALDWIN*

Let me attempt to channel the sentiments of my heart into words about a man who barely knew me, yet extended a hand to help me enter a world I thought I would never know.

I am scarcely alone in my story. Dean Eisenberg's life was marked with the legacy of helping others access the justice system in ways they never thought possible. His legacy is one of renowned pro bono work, especially with regard to seeking relief on behalf of those who had already been convicted. This is scarcely an ordinary calling. Very few people are interested in ensuring that common people without political connections or financial wherewithal still have their constitutional due process rights protected. Yet Dean Eisenberg made this mission his daily task.

Despite all this, the day that I entered law school, even as I was struck with the awe of merely being there, what impressed me most about Dean Eisenberg was how common he was, even after all he had accomplished in his life. He quickly defused the notion of elitism that permeates so many law schools across this country. He explained that we would enter the class of Americans with advanced degrees and what responsibility that entailed. He encouraged us not to get caught up with the competition of school to the neglect of our families. He was an inspiration even early in my law school career—but he was surely destined to remain a remote figure, wasn't he?

No. Over those long years of law school, I noted that, during my weekend studying sessions in the library, Dean Eisenberg was always working and always had his door open. I could not help but take those opportunities to pick his brain. Dare I say that, over that time, we developed a friendship? Much of his help merely involved reassuring me. On many occasions I ran into his office afraid that I would not get the job interview I wanted, the job I wanted. He assured me that I had already won the biggest battle, entering law school, and the rest would take care of itself.

I will miss Dean Eisenberg because he settled me down (as my father used to settle me down). I have a reputation for being calm and cool, dressed to impress; but if the truth be told, sometimes I am able to maintain that exterior only until ultimately I explode over some injustice or unfairness. When I would "go off" about some cause, Dean Eisenberg would always help me see a more complete perspective; he

* The writer is a lawyer in Milwaukee and an alumnus of the Law School, Class of 2000.

was masterful at that.

Perhaps Dean Eisenberg's greatest undertaking was his pro bono work, where he sought to bring justice to some everyday "Joe" who was somehow overlooked in our justice system. But I am glad he did not overlook me, a scared, but ambitious, small-town young man ready to take on the world. Dean Eisenberg and I were close because he saw my potential, and he helped me channel it. I miss him.

MARY T. WAGNER*

The first time I met Howard Eisenberg was in 1996. After seventeen years as a journalist, I'd decided to switch careers and had applied to law school. I'd recently gotten the word that I had been admitted to Marquette as one of the pilot group of "part-time" students, and I made a trip down to Sensenbrenner Hall to take the tour, sit in on a class, and meet the new dean. In particular, I wanted to thank him from the bottom of my heart for letting me in as a part-time student, since with four children including a kindergartner at home it would have been impossible for me to have gone to law school otherwise.

I think I caught him off guard, because he hedged a little in the conversation until my file arrived at his elbow. Reading it quickly, he realized that I wasn't there to plead my case against rejection. "This is unusual," he said with a smile. "I don't get many happy people sitting in my office." As he relaxed and settled deeper into his chair, he scanned my resume and generously volunteered that my background as a writer would serve as a distinct asset for a lawyer. It would open many doors for me, he said, and I stared at him in utter amazement and gratitude. It was a thought that had literally never crossed my mind. I'd been weaned on TV shows like *Perry Mason*, and I never saw Perry spend a minute of screen time agonizing over a brief. It was an encouraging observation, and a heartening one. I would think back to it often, especially during times like the first week of law school as I sat—surrounded and intimidated by classrooms full of bright young twenty-something overachievers—morosely thinking, "What the hell am I doing here? I am doomed to fail." It was also, as I would learn, absolutely typical of Dean Eisenberg.

* The writer is an Assistant District Attorney in Sheboygan County, Wisconsin, and an alumnus of the Law School, Class of 1999.

There are hundreds of people who knew Dean Eisenberg better than I did, who worked with him more closely, who saw him more often, who shared more personally and professionally. And yet, his stamp on me is indelible. In the obvious first place, I'm now an attorney, a goal I could not have reached without the changes he made at the Law School.

But his influence went far deeper than just allowing me a place in the starting line-up. From the very beginning he lived an example for us to follow that combined the pursuit of excellence, tremendous intelligence, mastery of the law, and passion for the downtrodden with a warm human touch and a wicked sense of humor. I can't claim to have enjoyed a very close relationship with Howard—if anything, I think a residual wariness naturally existed between a renowned criminal defense attorney and a student hell-bent on becoming a prosecutor. But I still stood in awe of his commitment to the disenfranchised, the marginalized, the indigent . . . and to us.

Dean Eisenberg was my professor in two classes—Appellate Advocacy and Post-Conviction Remedies. In the latter class, he took a novel approach to learning that again demonstrated his devotion to making us the best we could be. While success in so many law school classes boiled down to dog-eat-dog competition hinging on who took the best notes and could regurgitate them most concisely in a final exam, Howard turned that structure on its head. Intent on sending us out into the world with as much information as we could carry on the subject of post-conviction relief, he provided us with a hundred pages or so of detailed typed outlines, with statutes and case citations highlighted for each and every point he made. This seminar wasn't about competition, it was clear; it was about learning as much as we could and then going out into the world and doing something with it. It was also about keeping a sense of humor despite adversity. Howard, already the antithesis of "aloof," really warmed to his work in this class, regaling us with tales of his many defeats at the hands of prosecutors and judges when he was State Public Defender. Among them was the tale of a certain judge who, he swore, occasionally calibrated the length of his sentences by the number of pigeons sitting on the windowsill outside the courtroom. We were amused and appalled and enlightened in the same breath.

Our interests converged in a case pending in the Seventh Circuit while I was in his Post-Conviction Remedies seminar. Rather than have us spin our wheels puzzling through hypothetical situations, Howard paired us off to cut our teeth seeking post-conviction relief for actual indigent criminal defendants. His graduate assistant Margaret

O'Connor and I drew an assignment that would forever alter the prism of my own experience.

Howard had been appointed by the Seventh Circuit Court of Appeals to represent an inmate in Indiana who had already served ten years of a thirty-five-year sentence for murder. The question to be explored was whether his trial counsel should have pursued a post-traumatic stress defense at the time of the trial. The defendant had been convicted at the age of fifteen of shooting to death an individual with whom he'd had a three-year sexual relationship. The math wasn't hard to do. The victim, who was eighteen when the "relationship" started, had begun molesting the boy when the latter was only twelve. Now, putting the dead body in the trunk of a car after the shooting and then leading the police on a high-speed chase was not the smartest thing the defendant had ever done. But still, the case resonated with me, and I pored over transcripts looking for something to hang a rescue on.

What I found left me shocked and irate. The defendant had claimed that he shot the victim because he feared the older man would kill him in possessive retaliation for ending the relationship. It was bad enough that the defendant's trial lawyer had at one point characterized the shooting essentially as a lover's quarrel, when the relationship originated in repeated felony sexual assaults of a child. But a careful reading of the juvenile waiver transcript revealed that shortly after the shooting, police had videotaped an interview with an individual who corroborated the defendant's account of the older man's promise to kill him. The videotape and the transcript of the waiver hearing were never turned over in discovery by the State, and the prosecutor referred pointedly in closing to a lack of evidence to support the defendant's claims.

The defendant is now finally out of prison, not by an acquittal but on parole, more than a dozen years after the shooting. His case is still winding its tortured way through layers of federal appellate review, although the Seventh Circuit Court of Appeals handed down a procedural victory last year. Howard flagged it for me by e-mail with the wry caption, "Can't lose them all!" And I remain haunted by the case, and the thought of a young man who was failed by so many. The pride I take in being a prosecutor will forever be tempered by the recognition of how much power and discretion we wield in our pursuit of justice, and how casually that power can determine the course of a life, for good or ill. I have Howard to thank for that.

The last time I saw Howard Eisenberg was only a few weeks before his first heart attack. A few months earlier the Wisconsin Supreme

Court had accepted my petition to review a case, and I had frantically e-mailed him, asking for a thimble of wisdom on how to approach writing my brief to the court. I was on a fool's errand, some thought, since the case had already been lost in both the trial court and the court of appeals. Howard's advice was typically short, sound, and to the point—"think big and don't be afraid to argue public policy" was the basic thrust of it—but then he went the extra mile and offered to assemble a moot court to put me through my paces.

I gladly took him up on it, driving down to the Law School just a week before the supreme court argument. Howard was on the panel himself, of course, deftly slicing through my practiced rhetoric to point out a procedural Achilles' heel in the case that I had not thought of. I will always fondly suspect that his offer had not much to do with clarifying the larger state of the law in Wisconsin, and everything to do with helping me conquer a crippling fear of public speaking which he had witnessed first hand during Appellate Advocacy.

Howard died only a month before the supreme court decision came down in my case, and my elation at winning was paired with a sharp sense of loss that I couldn't call him and tell him the news. I suspect he knows anyway.

I believe that the true measure of a person is taken, not in the monuments he leaves, but in the lives he touches. If I am right, then Howard Eisenberg's legacy is not only enormous but infinite, as the ideas he advanced and the generosity he demonstrated create their own ripple effect in the lives of others. And so, while we miss you, Howard, in so many ways, you haven't left us at all.

Remarks to the Milwaukee Young Lawyers Association

HOWARD B. EISENBERG (1998)*

I am quite delighted and honored to have been invited to speak to you a little bit this afternoon about legal education as we enter the new century and the new millennium. You know, I am finishing my seventh year as a law school dean. For four years I was the dean at the University of Arkansas at Little Rock, a public law school, and now for almost three years I have been the dean at Marquette which, as you know, is a private, Catholic and Jesuit institution. The job does not get easier with time. Nationally, the average tenure for a law school dean is

* These remarks were delivered on February 25, 1998.

thirty-nine months, so as I enter my thirty-second month as dean at Marquette, I am turning into the home stretch. Of course, I don't know if I am running a sprint or a marathon, so this shouldn't be taken as a sign that I am ready to step down.

It is difficult to overstate the changes in legal education over the past thirty years, just as it is impossible to overstate the changes in the legal profession itself. Today slightly under half of law students nationally are women; many are older; many have families. Many law students have gone seriously into debt to fund legal education. At Marquette now the average educational debt load of students at graduation is somewhere between \$65,000 and \$70,000, including both undergraduate and law school loans. This is comparable to (actually better than) the situation at most private law schools, and the average debt load for students at public schools is not far behind.

The law student of today wants to be treated like a customer and strongly desires to be a satisfied customer. Law teachers are held accountable as never before by our students, as well as by university administrators and by the bar. Often these demands and expectations are in conflict with each other and in conflict often with themselves.

Law schools generate substantial revenue for their universities at relatively low costs, even with higher law school faculty salaries. University administrators want us to keep up enrollment and keep bringing in tuition. Of course, universities also want us to keep up our standards and continuously do better in national rankings, whether those surveys have empirical validity or not.

Law schools and their universities got fat and happy during the period of 1970 through 1990. The number of accredited law schools grew, the number of law students soared, and the legal profession seemed able to absorb an almost unlimited number of new lawyers. Of course, the market crashed in the early 1990s and is only now staging a serious recovery. We in Wisconsin were spared the sharp decline in lawyer jobs, but these matters were noticed here, too.

Now, over the last seven years, law school applications have fallen by almost fifty percent even as the job market regains health and vitality. The mere fact that the number of law students matriculating in law schools has remained steady, as applications dipped, should tell you something of the diminution in quality that has been experienced at many schools. Again, we in Wisconsin have been spared much, but not all, of this trauma due to our good demographics and the fact that there are only two law schools in the State.

Students are now quite demanding about what they want from a law school. Applicants negotiate over scholarships; look for schools with unique, almost bizarre, programs; and seek institutions that meet very specific needs. The best students can write their own tickets for scholarships at the elite, and not so elite, schools. Many schools are granting deep discounts on tuition to even average students to keep their enrollments up.

Law schools now aggressively market their products. They have well-known artists design the covers of their catalogs, they build expensive and beautiful buildings laden with the newest technology, and they advertise as being the best in whatever area of law they can lay claim to. Law schools, just as law firms do, now compete for customers.

The profession's expectations of law schools have changed quite substantially in this period. A generation ago law firms expected law schools to teach basic substantive courses—a fairly standard curriculum. Ethics was not taught as a separate course, skills courses were unusual, and specialty courses were discouraged. Clinical education was unknown. Law firms wanted lawyers *they* could train.

Now it is completely different. Lawyers expect new attorneys to graduate on Sunday, be admitted on Monday, and be representing clients on Tuesday, if not Monday afternoon. The profession now demands that we teach ethics, skills, specialty courses, etc., on top of the traditional courses, all within the same three-year period. The organized bar, and to some extent students themselves, have been pushing for the law schools to be more and more "practical." Courses in legal history, legal philosophy, or jurisprudence are left by the wayside as the pressure to add new and cutting edge courses increases.

The substance of the law has changed and will continue to change. The practice of law has become international, and we must retool our curricula to reflect this fact. Alternative resolution of disputes, other than traditional judicial remedies, must be added to the curriculum, as we have found that frequently only the very poor or the very rich can afford our civil and criminal systems of justice. Areas of law once non-existent or arcane now are prominent—intellectual property, cyberlaw, bioethics, etc.

The traditional structures of legal education are being tested. The accreditation standards for law schools have been changed to allow for proprietary schools. Some entrepreneurial lawyers have tried, so far with little success, to establish law schools with small, poorly paid faculty, high reliance on CD-ROM and on-line materials, and a complete removal of any kind of publication or scholarship requirement

of faculty. In this way, it is argued, more lawyers can be educated, and they can go out on the open market and fight it out. For these administrators, law schools would become just another vocational school, with no pretense of intellectual inquiry, development of the law, or anything other than high-volume vocational education.

On top of all of these challenges there are the traditional demands of alumni and faculty. Alumni want their school to be highly ranked, teach the courses the alumni believe are important, and in the manner they believe appropriate—while, at the same time, they reserve to themselves the right to continue to criticize things that occurred at the law school ten, twenty, or fifty years ago. Alumni want their law school to admit fewer students, and with better credentials—unless of course we are talking about the alumni's children, in which cases they believe that the applicants should be admitted to law school so long as they can spell their names correctly on the LSAT. Moreover, most alumni do not understand that our ability to grow and to improve the program is largely dependent on private philanthropy which they are reluctant to provide.

The job of a law school dean has frequently been equated with herding cats. I suppose the "cats" are the faculty. The large majority of law faculty, and especially the faculty at Marquette, are wonderfully dedicated men and women. However, faculty have an understandable desire to teach the courses they want, when they want, and as often as they want. Such desires do not always coincide with the demands of students, the needs of the institution, even pedagogical rationality, or the clock. Faculty want time to research and disdain service on committees, while reserving the right to be vocally critical of decisions made by those committees.

And then there are the national law school rankings, especially the *U.S. News & World Report* rankings of law schools. Recently most law school deans in the country, myself included, have publicly condemned the *U.S. News* rankings, and I will not whine about the matter today, except to point out how unfair these rankings are to our universities, faculties, and alumni and what a great disservice these publications do to those men and women seeking admission to law schools. The rankings either are based on discrete criteria which may or may not be relevant to the average applicants or, worse yet, are based on beauty-contest surveys, usually of lawyers who have never been near the law schools and have no firsthand idea about the quality or nature of all but one or two law school programs. These surveys are biased against non-elite schools located outside the East or West Coasts or the largest cities in

the middle of the country.

Of course, the profession itself presents certain challenges for legal education. Many members of the bar think that we already have too many lawyers, even while there are jobs in this city going wanting. The dropout rate among lawyers has been getting progressively higher, and the media have become interested in disenchanted lawyers and the general negativity within the profession.

In most quarters the practice of law has ceased to be a learned profession and is just another business. We advertise, firms and universities have marketing directors, we bid on work, and loyalty of lawyer toward firm or client toward firm is considered old-fashioned. Divorce among legal partners is now almost as common as divorce among marital partners. Interest in pro bono has declined; interest in public interest and even bar activities has waned.

An offshoot of the increased commercialism of the profession is hardball tactics, abuse of discovery, situational and relative ethics, and Rule 11 motions. I have heard many lawyers, particularly litigators, say that "it isn't fun any more."

The media have become increasingly strident in attacking the bar for every ill in our society. We are portrayed everywhere as greedy vultures without one ounce of goodness or kindness. Lawyers remain the one class within our society that it is "politically correct" to attack. Seemingly some radio talk show hosts, as well as comedians and late-night television personalities, can depend on laughs if they use the word "lawyer" in the same sentence as "rat," "snake," or some other unpleasant beast of prey.

The irony of all this is that there are millions of people in the United States, and many in Wisconsin, who do not have access to legal services. It would seem to me prudent for law schools and the profession to devote more resources and energy to developing ways to deliver high-quality, cost-effective services to the middle class, while assuring attorneys fair compensation. And yet I really don't see such activities. Instead, increasingly we hear calls for "unbundling" of legal services, meaning that we should allow non-lawyers to perform some services previously thought to be uniquely the "practice of law." Many firms are looking to paraprofessionals to decrease costs. Few people within the profession are worrying or even thinking about the large number of people who have need for legal services but who are denied access to the system for all practical purposes.

It is not always clear how law schools should react to all of these

changes and demands. My view is that, first, honesty is a good idea. While we may well have legal jobs for everyone upon graduation, the compensation will sometimes be less than the student was making before he or she entered law school. Compensation is generally only moderate, and few lawyers get really wealthy from practicing law. Most things lawyers do are not glamorous, and many are downright boring, if not mind-numbing.

Secondly, law schools have to make clear to students that they have a large role to play in their own futures. While there are jobs, seldom will employers come looking for you. Students have to be flexible with geography, substance, and prestige. If students are concerned about quality of life, these decisions must be made early on, lest the newly admitted lawyer find himself or herself in the office eighteen hours a day, seven days a week, while the marriage deteriorates and children grow up with a single parent, or no parent at all as both mom and dad are off working. Law school is stressful and the practice of law is even more stressful.

More than anything else we have to give this generation of lawyers the tools to undo the mistakes of my generation of lawyers. We must remind young lawyers and law students of the enormous potential for good and positive change that has always been the hallmark of the legal profession. People like me have to stop whining and have to show law students how wonderful the law is and the enormous satisfaction that can come from helping people solve their problems.

We must work hard in partnership with the bar to address the unmet legal needs of low and moderate-income people. We must create viable delivery systems to assure that everyone has access to legal services, while being mindful of the costs and problems experienced by the medical profession as it has expanded access to service through managed care and third-party payment.

I also think that law schools must be prepared to reassert their historic roles as gatekeepers. I have taught at three different law schools in three different states, and invariably when a lawyer is disciplined, someone in the law school—if not everyone in the law school—will say he or she is not surprised. One of the reasons our profession is so vilified is that a small number of lawyers are unethical, dishonest, and not fit for the profession. Frankly, I doubt that the percentage of such lawyers is higher—and it may actually be lower—than the number of dishonest or incompetent doctors, accountants, store clerks, or radio talk show hosts, but that isn't the point.

If we in legal education can identify people early on who lack the

competence, fitness, and character to practice law, we should take steps to remediate the problem, one way or another. As a member of the Wisconsin Board of Bar Examiners, I can assure you that it is difficult to identify such people when they apply for admission based on the few documents before us. Nowadays the politically correct position among law school administrators, myself *not* included, is that the law schools simply teach a set of courses, after which it is up to someone else to ensure competence, fitness, and character. This is hard to accept in Wisconsin, which remains the only state to allow admission to the bar for graduates of the two in-state schools without a bar examination. But even here, the deans at the University of Wisconsin and Marquette are no longer required to certify formally the character and fitness of our graduates.

Although I understand perfectly well why my predecessor at Marquette, the University of Wisconsin Dean, and the Board of Bar Examiners desired these changes, I do not think this was prudent. In most cases the law schools are the last body that has sufficient contact with the student to make a reasonable judgment about the individual's character.

On the other hand, we in legal education must come to the support of those within our profession who carry on the historic commitment—and a commitment that every lawyer admitted in Wisconsin literally is sworn to undertake—of representing unpopular causes or parties. And that is the same whether the party is an ax murderer, a politician, or a corporation. We can not allow the Jay Lenos, Mark Bellings, or the Dan Quayles of this world set the public's perception about our profession. We in legal education, and you in the bar, must be prepared to discipline our own—fairly but firmly—and to tell the truth about what we do and not to be ashamed about whom we represent. Our work is too important and the role of lawyers in our society too essential to our system of justice and liberty to allow the matter to devolve into one long, tedious "lawyer joke."

The 179 law school deans of accredited law schools in the United States must stop whining and start acting. Those of us in positions of leadership must be willing to step up to the plate, tell it like it is, and lead by example. In a very real way the future of our profession is in both my hands and yours, as the newest generation of our profession. We must work in partnership to improve steadily the quality of our educational system and our profession. Together we can make a difference. Thank you.

DON H. ADAMS*

The following is a little bit of a "shaggy dog" story, but for me it makes the case as to the kind of person Dean Eisenberg was.

I am a fifty-eight-year-old "non-traditional" law student. My wife of thirty years passed away from a long bout with lung cancer last year. In January 2001, I enrolled at Concord University, the Washington Post/Kaplan on-line law school. One of the things that on-line schools do not provide is the opportunity to browse the law books and sit down in a serious law study environment. Some students don't need that—there is Westlaw. I do. Thankfully, the Marquette Law Library is open to the public, and I spend part of several days a week and most weekends there hitting the books in the traditional fashion of law students everywhere.

One of the things I noticed during my trips, usually in the evenings and during the weekends, was that Dean Eisenberg was often working with his door open and in casual garb. On many occasions because of the hour or the day, it was the Dean, a few law librarians, and I. Because we "bumped into each other" rather frequently, we developed a nodding acquaintance. At my age, I know more attorneys who are thinking about giving it up and taking up something else than I know folks who still have a zest for the law at all hours of the day and night. Mr. Eisenberg seemed like he liked being there. As a "geezer" a few years older than the Dean, and with his knowing that I was a fledgling student of the law, I found his continuing zeal, cordiality, and enthusiasm motivating. When I saw him, it brightened my day.

During the last Marquette final exam cycle this past May, a sign was posted on the law library door indicating that the library was for Marquette law students and that others should please refrain from taking up space that the students might need to study for finals. It was Saturday afternoon and I trundled down the street to the Milwaukee Public Library, expecting to take up temporary occupancy there for the afternoon.

Unexpectedly to me, it was Law Day. There, sitting at one of the fold-up tables looking rather more like the driver's license bureau clerk at the DOT who answers questions about which form to fill out than the dean of a major law school, was Howard Eisenberg . . . no fancy suit, no name tag, not accompanied by "his people"—just a person under a "Law Day" sign, trying to be helpful to whoever came up with a

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problem about a repossessed car, an eviction, a missed Social Security check. I'm sure no one who spoke with him knew either his name or his status . . . but I did.

I got in line.

As background, in 2001 a former Marquette law professor wrote a very disparaging article in *Wisconsin Lawyer* stating that the "correspondence schools" such as Concord might—because of a "perhaps unwittin[g]" change in Wisconsin law—unleash scores of attorneys on an unsuspecting and vulnerable public and suggesting that the students didn't even need to attend high school (I'm partly paraphrasing, but without hyperbole). As a student of the school referred to specifically in the article, I could assure anyone that the author got it completely wrong. But not wanting to counter this argument on Marquette premises—after all, I am a guest and the University has been very generous to permit the public to use its facilities—I couldn't resist taking the opportunity on "neutral turf" to talk to the "Al McGuire of the law" to make my case and to try to set the record straight.

My specific legal question was, if and when the state supreme court takes up this issue, will folks have an opportunity to try and get the real facts before the court?

What I was expecting was a distrustful "Yours isn't really a real law school . . . it doesn't use the Socratic Method . . . it isn't accredited by the ABA" argument, which has been advanced by some who haven't really become familiar with the process that is an on-line legal education. (More than one-third of my contemporaries have advanced degrees, most are set and successful in established careers, and students are required to pass three bar exams to practice in Wisconsin.) In addition to the answer to my question, what I got from Dean Eisenberg was a real inspiration that was totally unexpected.

We had a great discussion about the advantages, disadvantages, and idiosyncrasies of "distance learning," as each of us saw them. He wanted to know why I hadn't chosen Marquette (I told him Marquette was twenty-eight years too late in its part-time program). In addition to a reasoned response to my concerns, what came through was his love of and respect for the craft, and I could tell he thought the study of the law was a worthwhile endeavor, at whatever age and via whatever method suited the student's circumstances (although I do not claim to have persuaded him of all my views on the on-line law school matter).

As I was walking back toward the law library and my car, I thought,

here was a person who didn't have to be there at Law Day (no one would question if he wasn't there), who was already working a lot of hours, whose position no one he gave advice to would know, but who gave this advice freely and gave me, a student that wasn't even paying tuition at Marquette, encouragement and inspiration to continue studying at my age, and who even invited me to visit and keep in touch as I progressed through school.

I can't tell you what that meant to me. I have wanted to study the law for forty years. I am a "little person" in law studies in an experiment that some fixed-facilities administrators find threatening . . . or at least troubling. He could have been far less accommodating.

I have no doubt that Marquette will find a new and accomplished dean to carry on the work of its fine institution. What I'm not sure about is that it will find someone with the human and inspirational qualities and concern for the "little people" that Dean Eisenberg possessed. In my limited contacts, he was truly remarkable in that way.

Address to Law Students

HOWARD B. EISENBERG (CA. 1996)*

I assume that many of you are confused by my topic. Regrettably, my remarks deal with neither pig farming nor drinking, so those who were interested in either of these subjects may want to leave now. My talk is really about the role of lawyers in society. I had considered several other titles:

"Does the Legal Profession Really Deserve to be Treated Like
Maggots and Parasites?"

"Should We Close All of the Law Schools and Wait Until All of the
Lawyers Die Off?"

"Are Lawyers REALLY as Bad as Everybody Thinks?"

"Do Lawyers Really Have Any Social Utility?"

I think as law students it is important for you to recognize the very real problems our profession faces. Some of these issues are legitimate concerns for the profession, some reflect the fact that lawyers frequently are required to do things that are unpleasant to one or more people, and still other issues are simply political.

* The date and original title of this address are unknown.

Lawyers have always been subjects of scorn because we tend to champion the cause of the oppressed—"little people," minorities, people charged with awful crimes. This results in resentment by many people who are threatened by the aspirations of our clients or who confuse the morality and judgment of our clients with those of the lawyer. More recently, lawyers have been criticized for representing big corporations, people with power, or the government. This upsets those people who believe that wealth should disqualify people and businesses from securing all of the rights to which they are entitled—or that government has no role in regulating how people conduct their lives.

Lawyers frequently lie between mob action and order. Preserving order takes time. It is deliberate and careful. Process, procedure, and reflection are important values to our profession, and we have found over the years that better decisions are made when the proper rules and procedures are followed than when decisions are made in haste or under political or emotional pressures. These values are inconsistent with a "sound bite" society that wants immediate gratification, in small words, and preferably with color graphics. This basic conflict between process and immediate gratification causes one whole area of conflict between the legal profession and lay people.

Lawyers protect people from the overreaching of government, and the government does not like that—whether the context is an illegal search and seizure, unauthorized enforcement of restrictive regulations, or the abrogation of constitutionally protected rights by the local, state, or federal government. Our duty, as lawyers representing clients, is to attack government law, policy, or conduct where warranted and to protect clients from the power of the state. All of this angers the powers that be and frequently annoys those in the media who denigrate the rights of individuals in favor of the perceived rights of the majority.

Lawyers are often the only voice for the oppressed and unpopular. Thurgood Marshall devoted the first half of his career to traveling throughout the United States representing people who were the victims of racial discrimination and economic deprivation and did not have an advocate. To a major extent, it has been members of the bar who have brought about changes, not only in the rights of racial minorities, but of women, persons with disabilities, older people, children, consumers, and other individuals who have yet to obtain their full rights under the law. Even in the case of criminal defendants, lawyers are often required to speak up and zealously defend those men and women who have committed unspeakable crimes. That is not because we believe that the crimes should be forgiven or are frivolous, but because of a fundamental

belief that zealous advocacy for the defense *and prosecution* is the best way to achieve justice and protect the rights not only of criminal defendants, but of you and me and our children.

Thus we should be proud of many of the accusations against us.

However, there is a darker side to our profession, and one that must change. There have always been individual attorneys who steal clients' money and take advantage of their positions as attorneys. We obviously must take prompt action to discipline such attorneys and protect clients. In fact, it is quite likely that we do a better job of policing the profession today than at any point in our history. But the problem is not with the bad apple. The problems with our profession are more fundamental and more far-reaching.

The practice of law has always had its business aspects. After all, if lawyers can't earn a living practicing law, there really is not much point. However, traditionally, the practice of law was different because there has always been a learned aspect to it. The legal framework has been regarded as something almost sacred, and entry into the profession was sometimes viewed as admission into an exclusive club. Of course, there were some very bad aspects to this system. It tended to discriminate against women, people of color, low-income persons, and people not of Anglo-Protestant stock. The fact is that a law school like Marquette was created, in part, to meet the demand for legal education from the children of Irish and Polish immigrants. The bar was an exceedingly conservative institution well into the first half of this century.

However, many aspects of the tradition and of the conservatism of the profession were good. Common-law doctrine was well understood. Lawyers, even opposing counsel, were learned colleagues. Modifications of existing rules were tolerated only when necessitated by strong policy reasons that had percolated for some period of time.

The changes in the profession began with the New Deal, accelerated after World War II, and shifted into high gear in the years of the civil rights movement of the 1950s and 1960s. Law became an engine of social change in a manner unimaginable a generation earlier. Law was being used to reallocate resources in our society, to achieve integration of public accommodations and public schools, and to provide remedies for whole classes of people who theretofore had no legal remedies.

Much of the progress in our society over the past fifty years has been the result, at least in part, of lawyers and legal work. Women, persons of color, and persons with disabilities now have a more equal opportunity because lawyers took risks and brought cases. Common-law doctrines in the area of tort and contract law have been modified to

reflect the reality of the twentieth century. Those who decry the increase in the number of lawyers and all the "awful" things that we do fail to even consider the many, many positive changes that lawyers have caused over the past two generations. The list is simply too voluminous to recount.

However, with the expansion of various areas of the law came damage awards and attorney fees that were simply unknown prior to the 1960s. The fact is that, except for the partners in the largest firms in the United States, few people became rich from practicing law. Some lawyers became comfortable by acquiring business and property interests, but most lawyers made only modest livings, and many lawyers have always struggled to make ends meet. In the 1960s and '70s it became possible for some lawyers to dramatically improve their earning potential by pushing the envelope on damage awards and on causes of action not previously recognized.

And there was nothing wrong with that. The contingent fee system does make legal services and legal remedies available to damaged parties who would otherwise be shut out from legal services. However, the expansion of tort litigation in many areas has resulted in an enormous backlash from potential defendants, whether that be physicians who are sued for malpractice, insurance companies assessed punitive damages for improperly denying a claim, farmers sued by neighbors for foul-smelling air, employers sued for discrimination, or state and local governments socked with damage awards resulting from the misconduct of their employees.

Further, some insurance carriers and defendants found it appropriate to settle cases, sometimes asserting that it was the cost of defense—rather than the merits of the claim—that led to the settlement. This encouraged some members of our profession to bring more suits that were not warranted, in the hope of obtaining a settlement from a defendant or insurance company that didn't want the expense and bother of defending even a frivolous lawsuit.

At the same time, defendants, insurance carriers, and those whose financial and political interests are consistent with those interests have pursued an aggressive media, public relations, and political campaign to "reform" tort laws. These reforms generally involve limiting some damage awards, shifting litigation costs to the losing plaintiff, and simply outlawing certain types of civil litigation.

All of this occurs during a generation in which the public images of lawyers have been largely negative. If one considers the television images of lawyers in the 1960s and compares them with those on

television now, we find that the Perry Masons of the 1960s were portrayed as tenacious fighters for the rights of their clients, often against seemingly overwhelming evidence. Today we see such programs as *L.A. Law* and even *Seinfeld* portray lawyers as money-grubbing, aggressive, meanspirited, and willing to cut corners or hurt someone in order to make some money. Whatever one thinks about the O.J. Simpson verdict, the conduct of the attorneys in that case—both in and out of court—has hurt our profession.

I am going to say a couple of things which might very well surprise you. First, some lawyers are parasites. There are lawyers who are greedy, ignorant, and obnoxiously aggressive, who no more care about the good of society than a serial killer. Such lawyers are walking violations of the Sixth Amendment. I must tell you, however, that I know of no evidence that the number of parasitic lawyers is any greater than the number of parasitic physicians, electricians, schoolteachers, sanitation workers, or members of any other profession or occupation. One of the problems for lawyers is that we do not produce a product, and the service we provide generally does not make people feel physically better or look better, nor often even make them happier. Another problem is that we speak in a strange code that sometimes sounds like English, but other times sounds like a foreign language. We operate under rules that are not always intuitive, and we generally do a poor job of explaining to our clients what is going on. Some people see these factors as evidence of a massive conspiracy on the part of our profession.

I also think that our profession has been much too unwilling to consider reform. It is possible that some limitation on damages (including punitive damages) and modification of discovery procedures and adversarial litigation in general would be advantageous not only to the public, but to our clients as well. I hope that in the next few years we will see a serious effort to deal with these issues in a somewhat less adversarial way than we have seen over the past decade when plaintiffs' lawyers were often pitted against lawyers representing industry, in an all-too-typical lawyers' contest of wills. I favor the civil jury system and the tort system as they now exist, but it would be foolhardy not to recognize that at least some of the criticism of the civil justice system has validity. Unfortunately, it is true that sometimes lawyers get so bound up with the process that we forget about the ultimate goal or best interests of our clients.

You are joining our profession at a time of unparalleled challenges. And the real question is whether you are going to get into the trough

and wallow with those lawyers who can't tell the difference between feces and rich soil, or whether you are going to do something about the state of our profession. Obviously, I hope you will improve the image of our profession, but more importantly work to actually make our profession better. Let me suggest some ways in which this is possible.

First, you have the duty to assist the public to understand the multitude of positive contributions our profession has made—and *continues to make*—to American society. The rule of law—the predominance of law over the whims of people—has been a driving force in this Nation's history from the Declaration of Independence, through the Constitution and Bill of Rights, up to today. The United States has been able to meld a heterogeneous society in a manner that is literally unmatched throughout human history. Our ability to bring together people from diverse backgrounds, with diverse interests and beliefs, has been accomplished by the general acceptance of basic legal *and moral* principles that are not practiced elsewhere. Today, South Africa, the former Soviet Union, other eastern European states, and the countries of the Far East are trying to figure out how to develop legal systems that respond to diverse populations in complex societies. All of these nations turn to the United States for assistance because our legal system is—in many (but not all) ways—the envy of the rest of the world.

But our duty also extends to cleaning up our profession, and that starts with you here and now. We must start with a reverence for the law and understand that first and foremost lawyers are guardians of the law and guardians of justice. When we act outside the law by bringing actions that are frivolous legally and unwarranted factually, not only do we violate ethical standards for the profession, but we encourage disrespect for law by members of the public at large. Frivolous litigation uses up scarce resources of the legal system and costs consumers millions of dollars.

Lawyers who bring unmeritorious actions give false hope to plaintiffs and cause undue anguish to defendants. Moreover, it is clear to me that until and unless the legal profession does a better job of policing the conduct of its members, the public will demand more intrusive ways of forcing regulation on an unwilling profession.

Second, you have a duty as law students to consider where the need for legal services exists and to use your skills and education to address those needs. Contrary to public perception, there are many legal jobs going unfilled. They may not be east of the river in downtown Milwaukee, nor on LaSalle Street in Chicago or Wall Street in New York, but the jobs exist. Jobs are going unfilled in rural areas of

Wisconsin—and most other states. Many of these jobs have greater income potential than most jobs in Milwaukee County. There are many segments of the lower and middle classes that do not have reasonable access to legal services. The profession has struggled to provide legal services to moderate-income people, and we have largely been unsuccessful. Your generation of lawyers will have to provide services to this client population, as well as to the millions of Americans who are entirely shut off from legal services for lack of sufficient resources, or transportation, or sophistication.

I do not favor mandatory pro bono, and I do not believe that pro bono legal service is the only answer—or even the primary answer—for addressing these unmet needs, but I believe with all my heart that as members of the bar, and as graduates of a Jesuit law school, you have a moral and professional responsibility to provide direct legal assistance to those who cannot pay you. Our profession has provided more free service than any other, and we can be very proud of that. However, in this era in which greed has sometimes replaced professional responsibility, we must redouble our commitment to pro bono legal services.

Let me also emphasize that sometimes lawyers are the only advocates for those who can not advocate for themselves. An African-American woman who is going to be denied a promotion tomorrow because of her gender or race does not know today that legislation may be considered by the Congress or the state legislature or that judicial decisions may be in the works that will significantly reduce her right to remedy that discrimination. The person who is injured next week through a defective product is unlikely to have an interest this week in speaking out against limitations on civil causes of action or damages in products liability cases. The woman who will be widowed, only to have the insurance company intentionally and improperly deny death benefits, does not know that restrictions on punitive damages may well impact her life in a way she never expected and in a way she does not now understand. When we discuss the work of lawyers, we seldom think of the work done by the profession to effectuate adoptions, to free women from abusive family situations, to assist in the creation of new business and new capital, to assist the widow or disabled person obtain Social Security benefits, or to work with local, state, and federal governments to improve the quality of life for all of us.

Sometimes it is necessary for trial lawyers to represent these interests, and ultimately these interests may be yours or mine or those of someone we care very much about. It would be disingenuous not to

recognize that plaintiffs' attorneys have a financial stake in these issues, but it would be equally disingenuous not to recognize that potential defendants have that same economic stake in restricting the rights of plaintiffs to bring such suits. The involvement of the plaintiffs' bar in the civil-justice debate has evened the playing field more than would ever be possible without the legal profession's involvement.

We also have a duty to educate the public and media regarding the values of the American justice system. We must speak out against blatant misrepresentations of our system, whether these be by television "news" reporters eager to gain ratings, disgruntled litigants or victims, lawyers who hide behind the First Amendment to produce advertising that misrepresents the legal system, or candidates for judicial office who attack the system through negative, dishonest, and pandering political advertising.

For too long the legal profession has allowed itself to be used as the whipping boy for all of the evils of society. Can you imagine what would happen if any racial, ethnic, or gender group were subjected to the same continuous barrage of malicious "jokes" as has been the legal profession? Lawyer jokes are about as funny as jokes that stereotype any group, whether they be Jews, African-Americans, Poles, or women. As with all stereotypes, such characterizations paint us with the shortcomings of only a tiny number of members of our profession. While I am not suggesting that we form a Lawyers' Anti-Defamation League, I am suggesting that all of us have a duty to remind our fellow citizens of what we have done. I find it ironic that many of those people who most take advantage of our freedoms are those who take unending pleasure in denouncing lawyers.

Finally, we have to return to some of the traditions of the old days—even if they weren't all that good. We must respect one another as colleagues at the bar. Hardball lawyering has hurt our profession and has not served the interests of our clients. Aggressive and zealous representation is not the same as acting like an SOB. Many members of the public think that in law school we offer courses in arrogance, malice, and belligerence.

I close by returning to my *Funk and Wagnall's* and looking again at the definition of "parasite." Are lawyers people who "live at another's expense without making proper return"? I don't think so. The profession has plenty of problems and plenty of lawyers who should be cleaning out septic tanks and not practicing law. However, one of the things that have made America what it is is zealous advocacy for all parties by attorneys who are skilled in the law, schooled in ethics, and

able to advance their clients' position even in the face of popular sentiment to the contrary, financial resources that are sometimes overwhelming, and even physical danger.

COLLEEN D. BALL*

About five years ago, I was working to form a bar subcommittee on appellate practice and a pro bono program for the state appellate courts. I was an associate at a large Milwaukee firm then and quite nervous that these projects would flop. One day, Howard Eisenberg called to join the subcommittee and offered to do pro bono appeals. I am embarrassed to admit that I did not recognize his name. When he explained that he was the Dean of Marquette University Law School, I wondered why a professor and dean would add bar association and pro bono work to a plate already heaped and overflowing.

The answer, of course, is that Howard loved all things appellate. When our subcommittee graduated to become the Appellate Section of the Wisconsin State Bar, he served as editor of the newsletter and eventually as chairman. He also wanted to be the "best lawyer money can't buy," and so became the section's perennial pro bono appointee. Howard didn't just take pro bono appointments himself, but worked behind the scenes to ensure that attorneys who accepted appointments in unfamiliar areas of law (including his niche, prisoner litigation) did not fall on their faces. He answered questions, read draft briefs, and posed as judge for their mock arguments. This assistance benefited the indigent client, to be sure, but it also impressed the importance of the work upon the volunteer attorneys.

He certainly touched my professional life—not just by his example but with his direct assistance. In one case, my client, a federal prisoner, sent a letter to my superior accusing me of providing ineffective assistance of counsel because I refused to make a particular argument. Some thought I should withdraw from the case. I turned to Howard. "These are difficult clients," he said, "but I just hate allowing him to screw himself." He offered to review the file and give his opinion on the strategic choices that I had made. "I will be objective," he warned, "so I might not agree with you." Gulp. If he disagreed with my choices, what would that mean? Well, in the end Howard wrote a memo, signed as Dean of Marquette University Law School, concluding that the client's

* The writer is a lawyer in Milwaukee.

proposed argument was frivolous. I sent it to the client and have not heard a peep about my effectiveness as counsel since.

Though I did not attend Marquette Law School, I sensed that Howard genuinely wanted to see me succeed as an appellate lawyer. He urged me to take on various projects that he thought would help my career. And, I think, he liked to be consulted on virtually any appeal. In the final month of his life, he read a draft of a brief that I had just written. Though he was very busy—tending to his academic duties, working on a special commission for the Archbishop of Milwaukee, preparing for a bar convention, and researching the anti-terrorism act for one of his cases—he made time to come to my office. We went through the brief page by page. As usual, his comments were blunt. He picked apart my language and tone in places and chided me for certain mistakes. Other arguments, he thought, could win.

At the end of our meeting, Howard wondered if I really had time to drive to Madison for the Wisconsin State Bar convention the next day. He knew that I was scheduled to hand out awards to attorneys who had taken pro bono appeal appointments during the past year. My life probably would have been less hectic had I found a replacement and not made the trip. But I am grateful for the gut feeling that I should go. In Madison, I shook Howard's hand, thanked him, and gave him a small award for his substantial work in the pro bono appeals program. Little did I know that I would never see him again. Looking back, I derive some consolation from the fact that our last meeting provided me a public forum in which to recognize his boundless service to those so much in need. I welcome the opportunity to do so again here.

NANCY C. ROGERS*

Howard hired me as his administrative assistant in July of 1996, a year after he became Dean of the Marquette University Law School.

When I arrived in the main office of the Law School for my interview, I was announced to Howard and he came out to greet me. As we walked to his office, he told me I had failed my first test, but that I should come in and we would talk. Needless to say, my heart took a dip, and I wondered how I could have blown the interview before it even

* The writer is an administrative assistant in the dean's office at Marquette University Law School. These are remarks delivered at the funeral of Howard B. Eisenberg at Temple Menorah in Milwaukee, Wisconsin on June 6, 2002.

began. The test was that his door to the hall was open, but I had walked right by it. This was my introduction to his open-door policy and his sense of humor.

As in any new job, I felt overwhelmed with the depth and breadth of the work and the boss. After about a month I went to him and said that I felt like I had wandered into a new land where I didn't know the languages—the academic, Marquette's, and the legal—and I didn't have a road map. He smiled that quirky smile and said not to worry, that we would make the map together. And so we did.

I enjoyed catching him unexpectedly with small practical jokes—not often, but at times when endless meetings, reports, and events to attend caused a muscle in his cheek to twitch (always a sign to me of his level of tension).

On one occasion, he picked up his message slips and promptly returned a phone call to Mr. Lyon, whose message was marked "important." He dialed, hung up, redialed, and hung up again. "Nancy," he called from his office, "did you give me the message to call Mr. Lyon? It seems to be the wrong number—I get the Milwaukee County Zoo." I replied that the number was correct . . . Happy April Fool's Day.

On another occasion, when he was on a fundraising trip in Florida with Father Wild, the President of Marquette University, Howard e-mailed, asking me to send him the evening transcription by overnight mail. He wanted to proof it and return it to me so that it would be ready upon his return for his signature and mailing.

I read the e-mail and thought to myself, "Howard, relax—you are in Florida and should have some time to sit in the sun and read a good book." With the blessing of Associate Dean Shirley Wiegand, who helped with the shopping, I did send him an overnight early morning delivery, which included a racy novel, a bottle of suntan lotion, and a small bottle of booze as well as a t-shirt. It did *not* include the transcription. I e-mailed him that the package would be at the front desk by 8:30 a.m., so he would have plenty of time to attend to it and be ready for the next appointment with Father Wild.

The next morning I had an e-mail message from a UPS inspector informing me that the package I had sent to Howard Eisenberg had the appearance of a bomb and had to be destroyed. Furthermore, it was against federal law to ship booze overnight, and I could expect a call from the FBI, probably a prison term of three to five years, and a \$400 charge to the UPS account. At this point my heart was racing, and I

thought how foolish I had been—"Why didn't I just do my work and leave all else alone?"

The last paragraph of this e-mail said that they didn't know who this Howard Eisenberg was, but he must be a fat slob as the muscle shirt was a size 3X.

It was signed I.M. Stern, UPS Inspector . . . but really Howard B. Eisenberg, Dean and Professor of Law.

This was the kind of humor we shared and what made working with Howard unique. We never talked about these events. I would just find a shiny red apple on my desk or a candy bar on my keyboard—his way of letting me know he, too, enjoyed this exchange.

Much has been written and said about Howard's commitment to pro bono legal work. Let me share some things that you might not know about Howard and this work. He answered every single letter he received from a prisoner—even when he couldn't provide representation. In many cases the correspondence was ongoing—providing some legal advice, sending a published opinion or words of encouragement, or offering a prayer for a sick relative . . . letters of hope to the hopeless.

Most of these letters are from men and women in Wisconsin prisons, but other states are represented as well. They fill a four-drawer file cabinet. Howard fondly referred to the writers as his "pen pals."

Howard used his own mailing address and never used the University's name. He did the typing of each and every letter and envelope. He purchased the stamps and all the office supplies for this work. He personally covered the cost of all collect calls from prisoners. He never blurred the lines between this pro bono work and Marquette University. I admired this integrity. It spoke volumes to me about who he was.

For those of you here from the legal community who have said you wish there were something you could do—there is. Carry on Howard's pro bono work. There is an immediate need for attention to several cases and a four-drawer file cabinet of people who would like to know that they will not be forgotten.

In the words of Robert Louis Stevenson, a man is a success who looked for the best in others and gave the best he had. This was Howard Eisenberg.

I have been blessed and privileged to have known him and to have worked with him these past six years.

*James Howard Baker and Howard B. Eisenberg—
Feathers from an Angel's Wing*[†]

VEL R. PHILLIPS* & MAXINE ALDRIDGE WHITE**

On November 23, 2002, the Community Brainstorming Conference (CBC) presented the James Howard Baker Award to Howard Eisenberg, posthumously, and formally announced the creation of a scholarship fund to honor Dean Eisenberg's legacy and memory. The award is given annually to someone who has worked quietly, consistently, and tirelessly to improve the quality of life for African-Americans, especially those living in Milwaukee's central city. We thought that it might be useful in this forum to describe CBC, James Howard Baker, and the reasons that CBC has given the James Howard Baker Award to Dean Eisenberg.

CBC is an organization of business, religious, and political leaders from Milwaukee's African-American community; it holds public forums to discuss strategies for advancing the lives of African-Americans and others in the greater Milwaukee community. The mission of CBC is to inform the community about a range of facts, issues, problems, and possible solutions that are germane to the well-being of the African-American community. CBC's Saturday morning meetings provide a forum for interaction between policymakers and the community.¹ The continuation of CBC does not depend on a single name, title, or person. Instead, CBC creates an opportunity for any individual, regardless of station or profession in life, to share ideas freely, in a relaxed, informal atmosphere.

CBC thus is a medium for discussion and exchange of information. No plan is drafted after discourse; no specific marching orders are given

[†] "The feather, whence the pen/Was shaped that traced the lives of these good men/Dropped from an Angel's wing." William Wordsworth, *Ecclesiastical Sonnets, III.V* (*Walton's Book of Lives*).

* The writer is Distinguished Professor of Law at Marquette University Law School.

** The writer is a Judge of the Milwaukee County Circuit Court and an alumnus of the Law School, Class of 1985. The writers wish to emphasize that the opinions expressed here are solely their own and are not attributable to the judiciary or any other entity with which they are affiliated. They also wish to acknowledge the assistance of attorney Leonard E. Martin in the preparation of this essay.

1. CBC meets on the fourth Saturday of every month, with breakfast at eight o'clock followed by a program, usually beginning at nine o'clock, which takes various formats, including individual speakers, debates, or panel presentations, and lasts for approximately two hours. The meetings are held at St. Matthew CME Church, 2944 North 9th Street, Milwaukee, Wisconsin.

to any group or committee. But there is a fire to do good created at CBC forums, sparked by the energy and enthusiasm of open, pointed, and sometimes, it must be said, painful and emotionally charged discussions. The lifeblood of CBC is its ability to create an environment that fosters and facilitates community debate and action, as well as positive reaction by civic and governmental leaders to the issues and ideas brought to light in these discussions. For this reason, it is not unusual for ideas raised in CBC sessions to flow through CBC into the action plans and agendas of individuals, private entities, and government bodies. In short, CBC allows ordinary citizens to participate in an extraordinary process.

James Howard Baker (1929–1990), after whom CBC has named its annual award, was a true community leader—he was not merely an engineer who designed material things, but also an individual who contributed greatly to the development of other people. At his funeral, his friends spoke of the significance of Baker's contributions to the Milwaukee community. Each commented that Baker was a man of brilliant intellect, immeasurable kindness, and quiet compassion, as well as a tireless volunteer, conscientious and generous with his time and talents.² Baker gave real meaning to the words of Winston Churchill: "We make a living by what we get, but we make a life by what we give."

Baker has been described as someone who was light years ahead of his time. His success as a trail-breaking draftsman and engineer was well known (he was the first African-American engineer hired by the City of Milwaukee). But his role as a very skilled, strong, influential civil rights leader was perhaps not so well known during his lifetime. The importance and depth of his remarkable work and its impact on the lives of others and the community were not fully realized until after his death. It was then, as people began to assess the effect Baker had on each of them personally and on the community as a whole, that it became apparent that he had been a dedicated and committed civil rights activist who declined the limelight for himself and instead worked quietly, meticulously, and diligently behind the scenes to make a difference for many, many people. The number of influential or well-known community activists who speak highly of Baker and who

2. Sherry A. Hill, a personal friend of Baker, provided a copy of his obituary from her personal records, and offered reflections on his life, work, and reputation in the community. She recalled that Baker was a very caring person, a true gentleman, very low key and quiet, very personable, a deep thinker, one who was "light years ahead of his time," and a strong activist. Ms. Hill's contribution to capturing the character of James Howard Baker in this essay was invaluable.

attribute at least part of their success to his help and support is itself a tribute to Baker's unselfish dedication. To cite an example dear to us, Vel Phillips first met Baker in 1956 when she ran for a seat on the Milwaukee Common Council. She recalls how Baker sought her out, volunteered to help, and followed through with hours and hours of service.

So, too, with Dean Eisenberg. Like James Howard Baker, Howard Eisenberg was a person with deep commitment. Like James Howard Baker, Howard Eisenberg worked quietly and tirelessly for others, with the true impact of his work unnoticed by most until after his death. And like James Howard Baker, Howard Eisenberg should be remembered and honored, even after his death.

More specifically, Howard Eisenberg embodied the very attributes memorialized by the James Howard Baker Award. It is widely recognized that, unfortunately, African-Americans comprise a large portion of our city's poor and disadvantaged and that many cannot afford legal fees. Like James Howard Baker, Dean Eisenberg provided comfort and solace to those in need, and used his talents to seek redress for the interests and conditions of others. He was a strong voice for many who feared that their conditions of confinement rendered them voiceless. Dean Eisenberg provided pro bono representation to so many, and he did so without any prodding, without any fanfare, without any desire for reward—he did so, that is, simply because it was the right thing to do. And the quality of his representation was not compromised regardless of the circumstances of his clients.

All of this is why CBC has bestowed its James Howard Baker Award upon Dean Eisenberg. Dean Eisenberg's legacy is one of personal sacrifice and giving. It challenges us all to donate professional time in order to give hope to the hopeless and to protect the rights of the poor, who suffer from real or perceived inequities in a justice system that sometimes punishes the underprivileged while protecting the rights of the privileged. All of us should follow the example of Dean Eisenberg.

We should note that in addition to Dean Eisenberg's posthumous receipt of CBC's James Howard Baker Award, a scholarship fund is also being established at Marquette University Law School for minority law students. This is a fitting way to honor a man such as Dean Eisenberg who gave so generously of his time, his talent, and his personal resources to those less fortunate. This scholarship, which will complement the already established Phyllis and Howard Eisenberg Fund, will support minority law students who pledge to participate in pro bono services after graduation. It will also help ensure the legacy of Dean Eisenberg

who so perfectly followed the command "to do justice, love mercy and walk humbly with God."³

In closing, we recall the words of James Howard Baker's eulogist: "Tension without hope leads to despair; suffering with hope brings about the dawn of new light. [Almighty God,] You have called James Baker to walk among us that we might never despair; that we might learn the definition of compassion, not from a dictionary but from his lived actions."⁴ Surely this is true of Howard Eisenberg as well.

His Honor

CHARLES DAVID SCHMIDT*

Dean Howard B. Eisenberg was a monumental human being. That he will be dearly missed by his family, friends, and colleagues could go without saying. But as evidenced by the numerous distinguished persons who readily volunteered to laud the Dean's life and accomplishments, the love and respect that the Dean earned in his life will not—as it should not—go unhonored in his death. I, too, in my own way, hope to honor the Dean.

Like the other authors in this issue, I was privileged enough to have shared experiences with Dean Eisenberg. These experiences began when I was a new student at Marquette University Law School. At that time, not knowing quite what to expect from my legal education, I was pleased to see in the dean of my law school the person who is described in the other tributes in this issue—a person of candor and humor, a person embracing both the theoretical and the practical, a person of compassion, a person of great moral character. I also was impressed by how Dean Eisenberg so selflessly maintained, in addition to all of his other duties in life, a pro bono caseload substantial enough to provide a career in itself for most lawyers. Most of all, however, I enjoyed hearing the Dean's frequent reminder to go forth and "do good." I thought to myself that this is a person whose calling I should strive to emulate.

Five years later, while sitting at Dean Eisenberg's memorial service,

3. Micah 6:8.

4. Father Matthew Gottschalk spoke these words at James Howard Baker's memorial service which was held in Milwaukee on February 22, 1990, and he graciously contributed his records for use with permission for this article.

* The writer is a lawyer with Cannon & Dunphy, S.C., in Brookfield, Wisconsin and an alumnus of the Law School, Class of 2000.

I recalled this thought. Upon further consideration, I was somewhat embarrassed to note to myself that in light of other concerns—job searches, student loan payments, and billable hours, to name but a few—this thought had been shunted aside somewhere along the way. But with the thought back in mind, while listening to the praises of the Dean's life, I decided to do my part to attempt to honor the Dean in death by doing what I now believe I should have done years ago—by doing my small part to carry on the Dean's pro bono work.

After a few days of letting this idea simmer in the back of my mind, I called the Law School and let it be known that I was willing to take over one of the Dean's pro bono appellate cases. I later received a call from the Law School explaining that there indeed was an appeal needing some rather immediate attention. I enlisted.

Over the next few months, I plunged headlong into an appeal of an inmate certiorari action that the Dean had been handling at the time of his death. Initially, it was a rather daunting task. I had to locate the seven inmates whom the Dean had been representing and learn their goals and intent, review thousands of pages of documents, and file a petition for review with the Wisconsin Supreme Court. Then, much to my surprise as a civil attorney, I began to encounter some of the problems common to the Dean's work with inmates: facility transfers, temporary lockups, administrative and bureaucratic difficulties, and the like. After countless off-hour emergency calls from my clients and discussions with opposing counsel, seemingly endless legal research, and a series of emergency motions, I finally began to truly understand the dedication with which Dean Eisenberg had undertaken his work. As the scores of hours that I spent on this single case rapidly began to accumulate, I constantly reminded myself that the Dean handled dozens of similar cases at any given time in addition to fulfilling his duties to his family, to the Law School, and to himself (or at least to the Cubs).

On August 13, 2002, I learned, perhaps, why Dean Eisenberg was so willing to place this all on himself. On that day, I received a letter from the Columbia Correctional Institution. Assuming that the letter contained some dire news from my client about an unbeknownst recent twist in his case, I cautiously read:

Mr. Charles Schmidt,

Well, today has been one of my best days during my period of incarceration. Thanks to you and the late Howard Eisenberg, we are victorious

Thank you for your diligent efforts concerning this case.

From the bottom of my heart, your time and commitment were greatly appreciated. . . . The late Howard Eisenberg would be proud of you. (Smile.)

Reading this letter was and remains the absolute high point in my professional career. Not only had I received a sincere thank-you for my work, something that unfortunately does not happen in life as often as we would like, but I achieved what I had set forth to do: I had given some of my time to help another person and, at the same time, felt that I had honored the Dean. As a result, the Dean's case rekindled in me something that previously had been lost in the shuffle.

To be sure, the case is only one of many that Dean Eisenberg simultaneously handled. However, it is one that, but for the Dean's compassion and diligence, might have gone overlooked. I hope that, as I did my small part to carry on the Dean's pro bono work, my client was right—that the Dean did smile down. Moreover, I hope that the Dean's directive to all of his students to go forth and do good will lead others to honor him by periodically giving a bit of their time to those who otherwise may go overlooked. Based upon my firsthand experience, I submit that it can be the most gratifying part of a career.

Upon reflecting on my experiences with the Dean, both during his life and after his death, I am reminded that the lesson the Dean shared with us through his candor and humor, theory and pragmatism, and compassion and ethics should not pass with his untimely passing: Lest we forget to be human, we all have the duty to go forth and do good. The Dean's death brought this lesson to the front of my mind. Therefore, I tried to follow his lead in his honor. But after following his lead through the tribulations and gratifications of one of his pro bono cases, I say from the bottom of my heart: Thank you, Dean Howard B. Eisenberg. It has been my honor.

JOSEPH D. KEARNEY*

Howard Eisenberg was my hero. If you take Milwaukee's daily newspaper and read it last Thursday, you know this. Howard was my hero not because we shared everything. Howard was Jewish, liberal, and, perhaps most importantly, a Chicago Cubs fan. I am Catholic, conservative, and, certainly most importantly, a Chicago White Sox fan.

* The writer is Associate Professor of Law at Marquette University Law School. These are remarks delivered at a memorial service held at Marquette University on June 14, 2002.

No, Howard was my hero because I admired him for the way he lived his life. Though he possessed a terrific sense of humor, he approached his responsibilities—many of them assumed voluntarily and at great cost—with a seriousness of purpose. As my mother used to say of someone—and this was a high compliment—he took life seriously but not himself.

Thus, I have tried increasingly for the past five years—and will continue to try—to model many of my undertakings after him. This is not to suggest that I will pursue the same causes. True, I have taken one case over from him, on behalf of an inmate in Indiana, and true, he and I worked together on behalf of a Holocaust survivor in what we knew was a surely hopeless effort to sue the Federal Republic of Germany. But we have also had different pro bono interests. Time that he spent on criminal cases I have spent, for example, on behalf of Marquette University High School.

But I must speak more broadly of why I admired him. Howard's job within the University was not that of a lawyer for the downtrodden. It was as the Dean of the Law School. And in this—let it be said today, and let it be remembered hereafter, both without the Law School and within—he *excelled*. I recall asking him in my initial interview almost six years ago what his job entailed. He said—and I quote exactly—"my job is to make it possible for other people to do their jobs." At the time, I presumed that, by this, he meant that if one was pursuing scholarship, for example, Howard would help the person obtain a summer research grant (a concept unknown to Marquette University Law School prior to his arrival). And he did mean this.

But many of his colleagues at the Law School have taken a broader lesson. Howard made it possible for us to do our jobs by providing an example. He provided an example not only because—to the extent possible, consistent with his other responsibilities and interests—he pursued scholarship. And I mean by this not only the 184-page article that he recently co-authored on judicial elections, but numerous other pieces. They range from the 1972 *Marquette Law Review* article that Professor Tom Hammer tells me continues to be widely admired in criminal-law circles to a recent article in the *Journal of Appellate Practice and Process* on interlocutory appeals.

But Howard's example was broader than his cases or his scholarship or even his teaching (I am aware of no law school dean in the country who taught more). It was an example of how to take one's responsibilities seriously and to pursue them on a full-time basis. We on the faculty who took that example loved Howard as our dean, not for

any narrow advantage (the last time I had lunch with Howard alone was the day I accepted Marquette's offer), but because he inspired us.

The other night, in attending the last night of shiva, I was honored, as were others, by Rabbi Lerer and the family by being asked to read a short prayer. It made me recall that I had learned a good deal about the Jewish tradition over the last week, much of which seemed so familiar to this Catholic. And this got me to thinking about some Catholic traditions as well, and there is a phrase in Catholic tradition that gives me much comfort and much hope for the future. It is the phrase *in pectore*. As Howard (who studied Latin at Austin High School in our mutual hometown) could have told you, this is Latin for "in the heart" or "in the breast," and it is used to distinguish the internal from the external (thus, a pope appointing a bishop in a Communist country might simply appoint him *in pectore*—meaning that the pope, in his heart, knows the person to be a bishop, even if it is too dangerous for the civil authorities to know).

The phrase gives me comfort and hope because, for us, this is where Howard now is. He is no longer with us in the flesh. But, for me and I am sure for others, he is with us *in pectore*. And that is why the first sentence of my talk, that Howard Eisenberg was my hero, must be revised. Howard Eisenberg is my hero, and will continue to be.

JANINE P. GESKE*

We are here today to honor Howard B. Eisenberg—loving husband to Phyllis, devoted father to Nathan, Adam, and Leah, loyal son to Margie and Herman, superb Dean of the Marquette University Law School, dedicated professor of law, community and bar leader, champion for justice for the underprivileged and disadvantaged, appellate attorney extraordinaire, friend and ally of the poor, students, faculty, administrators, staff, lawyers, clients, rabbis, priests, political leaders, and the entire human community.

How do I begin to talk about "our" Howard? I have to say "our" Howard because he belonged to the hundreds of people here today and to the thousands of other people whose lives he touched in his much too

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short fifty-five years on this earth. If you knew Howard Eisenberg, you are a better person now than before you met him. He called each one of us to a higher level of service, integrity, and excellence. To know Howard was to know a true hero.

What we now know is that Howard was on temporary loan to all of us from God. He showed us all how to truly live a faith-filled life in a complicated and often-troubled world. Howard, in his now-famous speech entitled "What's a Nice Jewish Boy Like Me Doing in a Place Like This?" (referring to Marquette University Law School), wrote:

[B]ringing God into our daily lives and our daily work does require that His message change how we conduct ourselves, every day, in every situation. How do we interact with our colleagues, with our staff, with our opponents? What language do we use? Do we go out of our way to do pro bono work, to help the needy, to listen to those who have problems? Living a spiritual life must become "business as usual" for each of us, Jew or Gentile, Christian or Moslem. We each bring to our work our experience and our religious faith, and that is of critical importance, but our faith and religious value system must transcend work as lawyers, as teachers, as judges and extend to all persons of goodwill. If we succeed in doing this, we will have advanced God's will and our individual faith. Our clients, our colleagues, our students, and society will be better served. We will be better and more effective attorneys, and altogether better human beings.[†]

Foremost, Howard taught us how to speak the truth. In that same speech he talked about the need for people to have the courage to speak the truth. He said, "Some things are considered 'politically correct' which are morally wrong or intellectually foolish. Neither Abraham, Moses, Jesus Christ, nor St. Ignatius was politically correct. None of those men were apologists for the status quo. It is necessary—essential—to take moral stands and stick to them in the face of those who favor political convenience, relative truth, or a least-common-denominator code of ethics."^{††} No one in this room can doubt that Howard lived up to his words. He was a preacher who always told it like it was. We always knew where Howard stood and what he believed.

[†] The entirety of this speech is reproduced as part of this issue. See *supra* p. 336 (quoted material at p. 346).—ED.

^{††} *Id.* at 343.—ED.

Howard cared as much about the lives of his clients as he did their legal issues. In looking through his files, I found this letter I want to share with you. Howard answered a letter from a client in the Supermax Correctional Institution in November of last year. His letter reads:

You have spent your life trying to understand things. With great respect, it hasn't really gotten you very far. It is not possible to understand everything, and sometimes the frustration and anger we feel, trying to understand everything, can cause enormous damage. If I dwelled on everything and everyone I didn't understand, I would be paralyzed—unable to function.

You are in the harshest prison in the State, and that sucks. You know that and I know that. It is easy for me to say, move on, but, in reality, you are in for a life of misery if you dwell on things you don't understand. You can't undo your crimes or change how many people in the free society think about convicted felons. You can't change how some correctional officers think and act. You can't control anyone but yourself. Unless you get control of those things you can control, you are going to live a short and even more unhappy life.

I am a lawyer, not a philosopher or a priest, but I have spent my adult life representing convicted felons, from serial killers, to spies, to prostitutes. Those who spent their time in prison looking backwards were miserable and usually ended up dead or back in prison shortly after they were released. Those who looked forward did better while confined and had a better life on the street when released.

Thank you for remembering me in your prayers, I can use all the help I can get.

Very truly yours, Howard B. Eisenberg

Often, Howard was also on loan to us from his family. We all are here today to support Phyllis, Nathan, Adam, Leah, Margie and Herman, and the rest of his family in their grief and to tell them thank you for generously sharing him with all of us and with his incarcerated clients who could not be here today. He was proud of his family, loved each one of them dearly . . . but God had big plans for Howard. He was called to lead and to set an example for all of us to live our lives with integrity and faith and a commitment to service. Thank you, Eisenberg family, for your love and support for Howard. We all know that it was your emotional and spiritual support, as well as the sacrifices you made for him, that enabled Howard to do all that he did.

Father Robert Wild, President of Marquette University, described how the Marquette community feels about losing Howard: "He was also a very good friend to many of us, and his counsel, his humor, and his human touch will be dearly missed. Quite simply, he was both a superb legal professional and a splendid human being."

Although we all loved the many things that Howard accomplished, we also worried about his long hours and workload. So many of us tried to tell Howard to slow down, not work so hard, not take on so many pro bono cases or so many community service projects. He always nodded and then responded that much work needed to be done. In speeches to law students Howard always told them, "Do well and do good." I believe that Howard was driven by a spiritual force greater than any of us, which told him to do lots of good on this earth. We knew that he believed with a passion in the importance of all of his work. He never could turn away an opportunity to do more good for someone else.

Some of you here did not have the benefit of knowing Howard in his work at the Law School. He had literally an open-door policy—his door, which opened into a main hallway, was always wide open. The sign outside the door reads: "If this door is open, please feel free to come in." When Howard was in the office, that door was always open, and every day people came to have a few moments with him. Students, faculty, administrators, alumni, and homeless people all would wander into that office. He would stop whatever he was doing and listen. He once told me that he enjoyed the homeless the best—they spoke with such honesty.

His office door has been closed since he became ill. That closed door truly began to bother many of us as the days passed. Yesterday someone asked Nancy Rogers to open up his door and turn on the light. Immediately people began to remark how wonderful it was to see his light and feel his presence again as we walked down the halls of the Law School.

When you entered his office, you immediately saw his posters about justice and the protection of the rights of the poor on the walls. Howard also had several prized possessions displayed there. Those mementos and items were an important part of who our dean was. Marquette University, as you know, has been trying very hard to improve the aesthetics of the campus. Much money and thought have been spent on how to make the Marquette campus a prettier place. I can tell you that Howard did his part in this project by displaying this piece of fine artwork—which reads "RESERVED PARKING FOR CUBS FANS"—in his office window so everyone entering the Law School

could enjoy it. He loved his Cubbies. It is not a coincidence that the Cubs won last night. Their biggest fan is watching over them full-time now.

I wish I could share with all of you the many, many "Howard stories" that I have heard in the last forty-eight hours—many, many students who would not have decided to attend law school but for Howard, many, many lawyers who deeply believed in the practice of law and helping the poor because of Howard, many, many alumni who would not have given money to the Law School but for Howard, and importantly many, many practitioners who have been inspired, encouraged, and mentored by Howard.

Shirley Wiegand, the Associate Dean of the Law School, who worked very closely with Howard these last few years describes what so many of us who knew him are experiencing:

I—we—are heart-broken. We have lost a truly great man. Howard brought joy, deep joy, to the main office. We all know he wasn't a touchy-feely kind of guy, yet every morning he would stand at my door, place his feet closely together, and bow deeply—he said it was a sign of respect. He respected everyone and found good in them all. Then he'd amble over to Jane Casper's desk and take a few pieces of chocolate from her candy bowl, say good morning to the staff, usually crack a joke or two, then head back to his office for another routine fifteen-hour day. He'd run from meeting to meeting to lunch to another meeting, from time to time emerging to share a story, vent about something or someone, then head back to his office to write that next brief.

Over the years, I found that beneath that tough exterior was a warm, caring, forgiving, sensitive human being. No matter what happened, Howard forgave. Many times when my feelings were hurt, I'd sit in his office trying to figure out how to respond. He taught me how better to love and to forgive. He bore no grudges and found the best in everyone he met. We will never forget him.

When Phyllis asked me to talk about Howard, I was overwhelmed with humility. How could I adequately describe this unique and great man? I thought the best way would be to tell you about my two favorite personal memories of Howard. Interestingly enough, both experiences involve Howard sitting on a bare floor. The first involved a spiritual retreat to the Dominican Republic. Chuck Clausen, now the director at the House of Peace, and I decided to put together for the retreat a group of lawyers and judges, including Justice Diane Sykes, Judge Elsa

Lamelas, Federal Magistrate Judge Patricia Gorence, District Attorney Mike McCann, and other distinguished lawyers, all of whom were Catholic. Howard wanted to go with us. The purpose of the retreat was to renew our faith and spiritual lives as we worked and lived among the poor in the Dominican Republic. Howard thoroughly enjoyed the trip, although upon return he vowed that he would never again attend seven Masses in one week.

The first day on that retreat we went to a very poor orphanage that provided a home for profoundly physically and mentally disabled children. The orphanage itself had little money. I remember we walked into the rooms with the children lying on blankets on the floors or crowded into small cribs. The children generally had no or little ability to see or hear and no control over their limbs or bodily functions. The smell in the room was almost overwhelming. Within minutes of entering, all of us found a child to hold, feed, and love. We quickly forgot the surroundings and focused on these children. I was seated on the floor, feeding a little boy whose limbs were permanently bent. Howard sat next to me and picked up a little girl who obviously was one of the most disabled. Although we did not know the children's names, he decided that this little girl's name must be Rachel. He sang to her and called her by her newly acquired name. Although she could not see him, she turned her little face toward him and smiled every time he spoke. The moment he would be quiet she would quickly turn her head, obviously looking to reconnect with this wonderful man she had just met. He fed her and loved her and rejoiced in this newfound special relationship they had created in this short time together.

My other memory of Howard on the floor happened behind the walls of Green Bay Correctional Institute, a maximum-security prison. I have been working with victims and offenders in Green Bay for some time. I asked Howard to come join me, and, of course, he agreed. I was teaching a segment on restorative justice and asked the men and some female victims to get into small discussion groups. The next thing I knew Howard was on the floor in the middle of one of the groups, talking to the men and women, generously sharing his wisdom and himself with these murderers, rapists, and victims.

Howard will be remembered for many wonderful things. He has changed all of us because of the integrity and commitment with which he led his professional and private life.

We will miss his practical jokes and humor, his love of family and friends, his devotion to a loving God, and his ability to accomplish so much in so little time. We will miss his leadership, his mentoring, and

his commitment to justice. Most importantly, we will simply just miss Howard, our friend.

When I have talked to people in the last two days, they describe Howard as their hero, a giant of a man, or a man with a heart and soul so large that his generosity and kindness had no end. We loved and respected Howard for his honesty and his integrity. We all grieve today because he shared that heart with all of us. We cannot believe that that generous, kind, good heart could have stopped so suddenly. But we now have an obligation to keep his heart beating in all of us. I will tell you what Howard would have told you: "Stop talking about me! Do well and do good."